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No. 554

Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, *Appellant*,

v.

E. I. du PONT de NEMOURS AND COMPANY, ET AL.,

Appellees.

BRIEF FOR APPELLEE E. I. du PONT de NEMOURS AND COMPANY

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1961

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Supreme Court of the United States

OCTOBER TERM, 1960

No. 55

UNITED STATES OF AMERICA, *Appellant*,

v.

E. I. DU PONT DE NEMOURS AND COMPANY, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLEE E. I. du PONT de NEMOURS AND COMPANY

OPINIONS BELOW

The opinion of the District Court (R. 3183-3265) is reported at 177 F. Supp. 1. The final judgment entered by the District Court on November 1, 1959, is set out in the Record at pp. 3300-3313. The prior opinions of the District Court and of this Court are reported at 126 F. Supp. 235 and 353 U.S. 586.

JURISDICTION

This action was filed on June 30, 1949, under Section 4 of the Act of July 2, 1890 (26 Stat. 209), as amended (U.S.C., Title 15, Sec. 4), and Section 15 of the Act of October 15, 1914 (38 Stat. 736), as amended (U.S.C., Title 15, Sec. 25) (R. 1). The judgment of this Court remanding the cause to the District Court (R. 2) was entered on June 3, 1957, and the judgment of the District Court pursuant to the mandate of this Court (R. 3300-3313) was entered on November 17, 1959. Notice of appeal was filed on January 14, 1960 (R. 3314), and probable jurisdiction was noted on May 23, 1960 (R. 3317). Jurisdiction of this Court to review the judgment below on direct appeal is invoked under Section 2 of the Act of February 11, 1903 (32 Stat. 823), as amended (U.S.C., Title 15, Sec. 29).

QUESTION PRESENTED

The judgment of the District Court divests du Pont, Christiana, Delaware, and all persons connected with the management of those companies of the right to vote any General Motors stock and of the right to be represented on the Board and in the management of General Motors, and grants injunctive relief which bars du Pont from influencing General Motors in any manner and requires that commercial relations between the two companies be conducted on a non-preferential basis.

The question presented is whether this judgment (entered by the District Court in the exercise of its "large discretion" to model a judgment "to fit the exigencies of the particular case") fails to comply with the mandate of this Court directing "equitable relief necessary and appropriate in the public inter-

est to eliminate the effects of the acquisition offensive to the statute" merely because the judgment does not also provide for divestiture of the legal title to the General Motors stock held by du Pont.

STATUTES INVOLVED

Section 7 of the Clayton Act (as it read at the date of the filing of the complaint) (38 Stat. 731; U.S.C. (1946 ed.), Title 15, Sec. 18); Section 15 of the Clayton Act (U.S.C., Title 15, Sec. 25); and Section 4 of the Sherman Act (U.S.C., Title 15, Sec. 4) are set out in the Appendix. Section 11 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 21), on which appellant relies, is also there set forth.

STATEMENT

This proceeding is before the Court for the second time. On December 9, 1954, the District Court ordered the complaint dismissed. 126 F. Supp. 235. On appeal, this Court concluded that du Pont had violated Section 7 of the Clayton Act. 353 U.S. 586. The judgment of this Court remanded the case "for a determination after further hearing of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute in conformity with the opinion of this Court" (R. 2). The opinion noted (at p. 607): "The District Courts, in the framing of equitable decrees, are clothed with large discretion to model their judgments to fit the exigencies of the particular case."

The mandate was filed in the District Court on July 18, 1957 (R. 2). Pursuant to that mandate, the District Court conducted extensive further proceedings. The first pre-trial conference was held on Sep-

tember 25.[1] At that conference the court, in order that it might "be fully informed of all aspects of the case" (R. 4), appointed two *amici curiae,* Andrew J. Dallstream and Manuel E. Cowen, both of the Illinois bar, to protect the interests of the stockholders of du Pont and of General Motors, respectively. The *amici* were charged by the court with the duty "to offer plans, to study the various plans proposed by the litigants and to make recommendations" (R. 4).

At the first pre-trial conference appellant requested and received 30 days within which to file a proposed final judgment (R. 5-8). Accordingly, appellant filed its proposed judgment on October 25, 1957 (R. 11-17). On November 21, 1957, on the motion of the *amici* and without objection from appellant or any other party, the court directed all parties to proceed "with all due expedition" to secure a ruling from the Commissioner of Internal Revenue as to the income tax consequences of effectuating appellant's proposed final judgment (R. 18). The request for ruling was filed on December 11 (R. 3154), but due in part to the fact that it was necessary for appellant to clarify its proposed judgment in several respects before the Commissioner could act (see R. 3166-3171), the ruling was not obtained until May 9, 1958 (R. 3171-3182). Five days thereafter, on May 14, 1958, a proposed final judgment was filed by du Pont (R. 19-25). In August, each of the *amici* filed a full report (not printed) and a proposed final judgment (R. 30-45, 47-55).

In late September, appellant filed a motion for a preliminary injunction restraining du Pont, Chris-

[1] It is the practice of the United States District Court for the Northern District of Illinois to recess during the summer months. In 1957 the recess extended from June 28 to September 9.

tiana and Delaware from acquiring additional General Motors stock, from voting any General Motors stock, and from having as an officer or director any person who was an officer or director of General Motors (R. 56). After a hearing on October 30, 1958 (R. 3322-3338), the court denied the motion on November 3 (R. 73), stating that appellant had made no showing that justified interlocutory relief, that the final hearing in the case was imminent and that no need had been demonstrated for piecemeal determination of the issues (R. 70-73).

At the October 30 hearing, appellant for the first time suggested that it wished to take depositions and engage in certain other discovery, as a result of which an early hearing date suggested by appellees became impossible (R. 3335-3336). Appellant's extensive discovery program necessitated additional pre-trial conferences (see R. 74, 96), and resulted in a further postponement of the hearing (R. 83).

The hearing itself began on February 16, 1959 (R. 260) and ended on April 9, 1959 (R. 2639). The court heard 57 witnesses and received in evidence more than 600 exhibits. Thereafter briefs and proposed findings of fact were filed by all parties and a further report was filed by each of the *amici*. Appellant did not, either at the end of the trial or thereafter, renew its prayer for interlocutory relief.

On October 2, 1959, the court filed an extended opinion (R. 3183-3265), which constituted its findings of fact and conclusions of law, and which outlined the substance of the judgment which the court proposed to enter. Following further proceedings on matters of form and detail (R. 3266-3299), the court on No-

vember 17, 1959, entered the judgment from which this appeal is taken.[2]

The Final Judgment

The significant features of the judgment entered by the District Court (R. 3300-3313) are:

1. *Voting provisions.* The judgment divests du Pont, Christiana and Delaware of all voting rights in any General Motors stock. The judgment also divests all officers and directors of the three corporations, and all members of their families who live in the same household with them, of all voting rights in any General Motors stock. This divestiture applies both to the General Motors stock owned by du Pont and allocable to Christiana, Delaware and the individuals described above as shareholders of du Pont, and to General Motors stock owned directly by Christiana and Delaware and by the individuals. Sec. VI A. R. 3304. The same section of the judgment further enjoins each of these corporations and individuals from influencing or attempting to influence any person, directly or indirectly, with respect to the exercise of voting rights in any General Motors stock.

[2] The suggestion made at page 80 of appellant's brief that there was undue delay in the entry of the judgment below is unjustified. The lapse of time between the receipt of the mandate and the entry of the judgment was the result of circumstances which neither the court nor appellees could control. A substantial part of the time was consumed in obtaining a ruling from the Internal Revenue Service on the tax consequences of appellant's proposed judgment; and the ruling was to some degree delayed as a result of ambiguities in appellant's proposal as first presented to the court. See p. 4, *supra*. Further delay was caused by appellant's extensive discovery proceedings, which it failed to begin until late in the fall of 1958. Appellant did not at any time request an early hearing and the only suggestion for an earlier hearing date was made by appellees. See p. 5, *supra*.

The judgment vests the voting rights divested from du Pont in the body of du Pont stockholders, *pro rata*, except that no voting rights may be exercised by Christiana or Delaware, or by the individuals described above. Sec. VII A, R. 3305. The mechanics of this pass-through vote, and the machinery for enforcing the disenfranchisement of those du Pont stockholders from whom voting rights are divested, are spelled out at length. See Sec. VII B, C, D, E, R. 3305-3308; Sec. X A, B, R. 3310. The judgment also provides for a monitor who is directed to observe and to report to the court on the operation of the voting provisions following each meeting of General Motors stockholders. Sec. VII F, R. 3308.

2. *Elimination of interlocking directors, officers and employees.* The judgment perpetually enjoins du Pont, Christiana and Delaware from knowingly having as a director, officer or employee any person who has served as an officer or director of General Motors any time after 90 days from the effective date of the judgment, and from knowingly having as an employee any person who is at the same time an employee of General Motors. General Motors in like manner is enjoined from knowingly having as a director, officer or employee any person who has served as an officer or director of du Pont, Christiana or Delaware after 90 days from the effective date of the judgment, and from knowingly having as an employee any person who is at the same time an employee of du Pont, Christiana or Delaware. Sec. IV A, B, R. 3302. The same section of the judgment enjoins du Pont, Christiana and Delaware, and their officers and directors, from nominating any person for election as a director of General Motors, and enjoins any person who is required to terminate his position with

any of the companies by reason of this section of the judgment from participating in or influencing the selection of his successor. Sec. IV C, D, R. 3302-3303. A report on compliance with these provisions was required 30 days after the 90-day period. Sec. IV E, R. 3303.[3]

3. *Acquisition and disposition of General Motors stock.* The judgment enjoins du Pont, Christiana and Delaware from acquiring, directly or indirectly, any General Motors stock, except that which they may receive by way of stock dividends or by the exercise of rights. Any stock so received is made subject to all the provisions of the judgment applicable to their existing holdings. Sec. III, R. 3301-3302. The judgment permits du Pont and Christiana to dispose of the General Motors stock which they now hold (Delaware owns no General Motors stock), by sale or otherwise, only upon notice to the Attorney General. If objection to any proposed disposition is made by the Attorney General, the disposition cannot be consummated until it is approved by the court. The notice and approval procedures do not apply to dispositions of 50,000 shares or less unless the disposition will result in a disposition of more than 200,000 shares within any twelve-month period. Sec. VIII, R. 3309.

4. *Other injunctive provisions.* The judgment contains a broad injunction forbidding du Pont, Christiana and Delaware from using, or attempting to

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[3] The reports filed with the District Court pursuant to this provision, copies of which have been lodged with the Clerk, disclose that within the period for compliance allowed by the judgment Walter S. Carpenter, Jr., Lammot du Pont Copeland, Henry B. du Pont, Emile du Pont and Donaldson Brown resigned from the Board of Directors of General Motors, and Alfred P. Sloan, Jr., resigned from the Board of Directors of du Pont.

use, directly or indirectly, any stock ownership of du Pont or Christiana in General Motors to influence or control General Motors in any manner whatsoever. Sec. III, R. 3301-3302. In addition, the judgment contains a number of specific prohibitions against certain types of business relationships between General Motors, on the one hand, and du Pont, Christiana and Delaware, on the other. Sec. V, R. 3303-3304. Thus: (1) Within 90 days following the effective date of the judgment du Pont and General Motors were required to cancel, and thereafter so long as du Pont, Christiana or Delaware owns any General Motors stock are required to refrain from entering into, any contract, agreement or understanding which requires General Motors to purchase from du Pont any specific percentage of its requirements of any product (except that after three years such contracts are permitted for not longer than one calendar or automobile year), or which grants to either General Motors or du Pont any exclusive patent rights, or which grants to du Pont any preferential right to manufacture or sell any chemical discovery made by General Motors. (2) So long as du Pont, Christiana or Delaware owns any General Motors stock they may not enter into or continue any arrangement with General Motors for joint ownership or operation of any business enterprise, and may not knowingly hold stock in any such enterprise in which General Motors holds stock. Similar injunctive provisions enjoin General Motors with respect to du Pont, Christiana and Delaware. (3) During the same period, du Pont is enjoined from dealing with General Motors with respect to any product developed by du Pont, or with respect to any patent, process or discovery owned by du Pont or in which it has a proprietary interest, on terms more favorable than

those on which it is willing to deal with General Motors' competitors. (4) General Motors is similarly enjoined, during the same period, from dealing with du Pont with respect to any product developed by General Motors, or any patent, process or discovery owned by General Motors or in which it has any proprietary interest, on terms more favorable than those on which General Motors is willing to deal with competitors of du Pont.

5. *Reopening provisions.* The judgment contains the customary provisions retaining jurisdiction in the court to enable any party to apply for further orders or directives, for the modification or termination of the judgment, and for the enforcement of compliance. Sec. XII, R. 3312. In addition, however, the judgment contains a separate section which provides that any party may apply to the court for modification of the judgment in the light of circumstances then existing: (a) in the event legislation should be enacted or there should be a change in regulations or rulings of the Internal Revenue Service which would substantially and significantly ameliorate the tax burden on du Pont stockholders of a distribution to them of the General Motors shares held by du Pont, or (b) in the event the provisions of the judgment prove inadequate to remedy the violation of the Clayton Act. Sec. IX, R. 3309-3310.

* * * * * *

In framing the major provisions of the judgment the District Court accepted substantially all of appellant's proposals save those that would have divested du Pont of legal title to the General Motors stock and required the sale of a portion of that stock. In several respects the court enlarged and extended appellant's

proposals. Particularly was this so with respect to appellant's proposed injunctions against certain business dealings (compare appellant's proposed Art. IX, R. 15-16, with judgment, Sec. V, R. 3303-3304); the scope of the provisions barring interlocking directors, officers and employees (compare appellant's proposed Art. X, R. 16, with judgment, Sec. IV, R. 3302-3303); and the scope of the reopening clause (compare appellant's proposed Art. XIII, R. 17, with judgment, Secs. IX, XII, R. 3309-3310, 3312).

All of the judgments proposed to the District Court —by appellant, by du Pont and by the *amici*—provided for the divestiture from du Pont of voting rights and the vesting of those rights in du Pont stockholders by pass-through provisions. The judgment proposed by appellant provided that pending divestiture of the legal title to the stock the voting rights would be passed through to du Pont stockholders except Christiana, Delaware and du Pont stockholders who are also stockholders of Delaware. The judgments proposed by du Pont and the *amici* provided for divestiture of voting rights in lieu of divestiture of du Pont's legal title. On the latter point, the court accepted the proposals of du Pont and the *amici*. The judgment, however, substantially modifies the du Pont proposal. It not only divests du Pont of voting rights in the General Motors stock held by it, but also forbids the *pro rata* pass-through of these rights to Christiana, Delaware, and the officers and directors—and their families—of du Pont, Christiana and Delaware; it extends the divestiture of voting rights to General Motors stock owned directly by the last two corporations and the individuals; and it includes more elaborate provisions relating to the enforcement of the disenfranchisement (compare du Pont's proposed

Secs. V and VII, R. 21-23, 24, with judgment, Secs. VI, VII, X, R. 3304-3039, 3310).

The judgments proposed by the *amici* provided the basis for the court's modification of the du Pont proposals relating to the divestiture of voting rights, and for the court's total disenfranchisement of certain individuals. See, *e.g.*, *amici* proposals at R. 33, 51. The proposals by the *amici* likewise supplied the basis for some of the expansion of appellant's proposed trade relations injunctions. See R. 38-39, 53-54. Finally, the section of the judgment permitting a reopening in the event of changes in the tax laws, or in the event the provisions of the judgment should prove inadequate to remedy the violation, which was not proposed by either appellant or du Pont, is similar to proposals made by the *amici*. See R. 44, 54.

The findings of fact of the court, on the basis of which it arrived at its judgment, and the evidence supporting those findings are set forth in connection with the argument on the several issues raised by appellant.

SUMMARY OF ARGUMENT

I

The judgment of the District Court fully and effectively protects the public interest. This case therefore does not require a choice between an effective and an ineffective remedy.

The judgment divests du Pont of all the rights and privileges of ownership of the stock in General Motors that were urged by appellant, and found by this Court, to give rise to probable consequences offensive to Sec-

tion 7 of the Clayton Act, and indeed goes considerably farther in protecting the public interest.

The judgment divests du Pont, Christiana and Delaware, and all persons connected directly or indirectly with the management of those companies, of any right to vote any stock in General Motors, including not only the stock held by du Pont but in addition that owned directly by Christiana and the individuals involved. The judgment also divests du Pont, Christiana and Delaware of any right to be represented on the Board or in the management of General Motors. The rights thus divested are those urged by appellant, and found by this Court, to have produced the probability of economic consequences forbidden by the statute.

In addition, the judgment enjoins the companies and persons thus divested of voting rights from influencing or attempting to influence anyone in the exercise of voting rights on General Motor stock. It also enjoins any commercial dealings between du Pont and General Motors that might give advantages to either company.

The judgment thus leaves du Pont with a sterile investment in General Motors which does not carry with it even those rights that can be exercised by a creditor, and prevents the possibility of preferential dealings arising out of, or even wholly apart from, any stock relationship between the companies.

Appellant's assertion that the exercise of voting rights by more than 200,000 diverse and separate beneficial owners of du Pont stock may influence the commercial policies of General Motors is inconsistent with appellant's own position that voting rights that are dispersed among a large body of individual stock-

holders will have no influence on corporate management. Since the judgment disenfranchises all stock held by corporations or individuals directly or indirectly associated with du Pont, the voting rights will be widely dispersed among a large body of stockholders and there will be no concentration of voting power in any group. The more than 200,000 beneficial owners cannot and will not act cohesively or in concert. Indeed they will have no knowledge of the state of commercial relations between the two companies.

In its own proposals appellant has attached no importance to the exercise of voting rights by du Pont stockholders; both in the District Court and here appellant's proposals make no provision against the exercise of these voting rights but on the contrary assume that during and after divestiture a substantial block of stock in General Motors will be voted by persons who are also stockholders in du Pont. In any case the dangers asserted to be inherent in the exercise of voting rights in General Motors stock by the du Pont stockholders do not justify appellant's demand for divestiture; those hypothetical dangers could be eliminated by a modification of the judgment which altogether disenfranchised all of the General Motors stock held by du Pont.

Appellant cannot justify its demand for divestiture of the legal title on the ground that otherwise du Pont may favor General Motors and thereby increase its power and influence in the automobile market. This argument assumes motives and conduct directly opposed to those on which appellant relied to establish the violation of Section 7. Appellant having prevailed by reliance upon one view of the facts cannot now

demand divestiture by insisting upon an inconsistent view of the same facts. No court has ever adjudicated the issues of fact or law raised by the contention that du Pont might favor General Motors and there is no record on which the adjudication necessary to appellant's contention could be made. Indeed, such evidence as there is contradicts the basic assumption of appellant's argument.

The District Court granted appellant injunctive relief against the possibility that du Pont might favor General Motors, stating that it did so "in deference" to appellant's "naked assertion" and not because there was anything in the record to justify this provision of the judgment. Appellant having thus obtained injunctive relief to which it is not entitled is in no position to demand the additional relief of divestiture merely on the basis of its "naked assertion". Even if only injunctive relief were involved there is no authority that would support appellant's demand. In granting injunctive relief a court may enjoin practices whose illegality has not been adjudicated if they are closely related to practices which have been found to be unlawful. But a court will not extend the injunctions to practices not "indulged in or threatened" by a defendant, or which are not designed to accomplish the results adjudicated to be illegal. *Hartford-Empire Co.* v. *United States*, 323 U.S. 326, 418; *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 90.

No court has ever granted the drastic relief of divestiture on a theory of illegality, or on facts, that have not been adjudicated. On the contrary this Court has consistently taken the position that divestiture should be granted only on the basis of specific

findings, supported by the record, as to the existence and illegality of the economic consequences that the divestiture is designed to dissipate and as to the nature, scope and degree of divestiture necessary to this end. *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 129; *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 172-174. See also *Hughes* v. *United States*, 343 U.S. 353, 357-358. *A fortiori* appellant cannot justify divestiture by reference to an asserted and hypothetical state of facts as to which there has been no adjudication, no findings and no evidence.

II

The District Court recognized that its primary duty was to frame a judgment that would effectively eliminate the effects of the stock acquisition that were offensive to Section 7. But at the same time it recognized that in choosing between different effective methods of eliminating those effects it should give consideration to the consequences which any particular method would have for approximately one million shareholders of du Pont and General Motors. *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185. Appellant does not ask this Court to reject the findings of the District Court that appellant's proposed plan of divestiture would have inflicted serious hardship upon these shareholders, and indeed has abandoned that proposed plan. Nevertheless, appellant continues to urge that divestiture of the legal title to the General Motors stock can be accomplished without undue hardship to those shareholders, and suggests that this Court simply direct du Pont to undertake this divestiture and leave it to du Pont to find a method or combination of methods that will avoid the injuries

found by the District Court to be inherent in any plan of forced divestiture of legal title.

A

The judgment proposed by appellant in the District Court provided for divestiture of du Pont's legal title to General Motors stock by a combination of distribution of the stock as dividends and sales of the stock. This proposal would have had serious tax consequences for the stockholders of du Pont and would have substantially depressed the market value of the stock of both du Pont and General Motors, to the injury of the approximately one million persons owning that stock. The entire amount of the distribution would have been taxed to the du Pont stockholders as a dividend at ordinary income tax rates. An independent statistical research study showed that as a group individual beneficial owners of du Pont stock would have paid taxes on the market value of the General Motors stock distributed at a rate somewhere between 55 and 60 percent, and that the total tax bill to those stockholders would have been between three-quarters of a billion and one billion dollars. Because the distribution would in fact have amounted to a return of capital, this tax would have represented, in economic terms, a substantial capital levy on the stockholders' investment in du Pont stock.

The depression in the market value of du Pont stock would have resulted from the substantial increase in the supply of du Pont stock offered for sale and the simultaneous decrease in the demand for the stock. Many du Pont stockholders would have offered their stock for sale in order to avoid the capital levy result-

ing from the impact of the taxes. Many trustees, who hold a large quantity of du Pont stock, would have felt compelled to sell in order to avoid the capital levy and the controversy and litigation which would have been involved in allocating the General Motors shares between life beneficiaries and remaindermen. Institutional investors, who would normally be the most likely purchasers of stock thus offered for sale, would have found it unattractive because of the tax liability inherent in its ownership and would have become purchasers only at very depressed levels. The depression in market value would have lasted throughout the ten year period prescribed in appellant's proposal.

The market value of General Motors stock would also have been severely depressed for a like period. Under appellant's proposed judgment there would have been sales by a trustee of 2,000,000 shares of General Motors stock each year for ten years. In addition, there would have been forced sales—estimated at 1,000,000 or more shares each year—by du Pont stockholders faced with the necessity of obtaining cash to satisfy their tax liability caused by the distribution, and there would also have been substantial selling by General Motors stockholders unwilling to retain a stock which would be depressed in value for a decade or more. At the same time, there would have been a significant decrease in buying interest.

B

Of the three methods now suggested by appellant as means of avoiding the drastic consequences found by the District Court to inhere in appellant's now abandoned plan, only one was not considered by

the District Court—the exchange of General Motors stock for du Pont preferred and common stock. Because of appellant's failure to make this proposal in timely fashion and in the appropriate forum (*International Salt Co.* v. *United States*, 332 U.S. 392, 401), the suggestion cannot be tested against the record. It is apparent, however, that the proposal would involve tax and market complications which appellant has not sought to resolve and which would make it so speculative and complex as to be wholly unfeasible.

Hence appellant's present proposal in actuality would require du Pont either to sell or to distribute substantially all of its General Motors stock. As the District Court found, these methods or any combination of them necessarily would impose unnecessary injury on approximately one million du Pont and General Motors stockholders.

Appellant cannot properly maintain, as it now attempts to do, that the District Court and this Court should regard the impact of federal taxes as "not a pertinent factor". Appellant itself regarded the tax consequences as an important consideration in drafting its plan and at the hearing below. Representatives of the Department of Justice and of the Treasury Department have recognized the importance of taxes in the framing of antitrust decrees. Appellant's present position is completely inconsistent with the teachings of this Court and with traditional principles of equity.

III

Complete divestiture of the legal title is not a mandatory remedy under Section 15 of the Clayton Act.

Appellant's argument to the contrary would require this Court to hold that in this case, and in all other Section 7 cases, the courts are required as a matter of law to order complete divestiture no matter how unnecessary that relief might be to eliminate the effects of the stock acquisition that are offensive to the statute, and no matter how extreme and harsh the consequences might be to innocent persons. Appellant's construction of the statute would destroy the most important power possessed by courts of equity by depriving them of their traditional "large discretion" to select or to devise remedies to meet the exigencies of a particular case.

The words of Section 15 are precisely the same words used in Section 4 of the Sherman Act. The legislative history of Section 15 shows that it was intended to give the federal courts the same range of equitable powers that they possess and have always exercised under Section 4 of the Sherman Act. Both before and after the passage of the Clayton Act the courts have held that divestiture is a permissive and not a mandatory remedy under Section 4. Appellant does not contend to the contrary. Appellant is, therefore, forced to argue that the very identity of the language in the two sections necessarily means that a remedy permissive under Section 4 is mandatory under Section 15. Nothing in the words of Section 15, its legislative history or the decisions of this Court provides any support for this contention. Appellant's construction of Section 15 is unreasonable because it leaves the federal courts with less discretion to devise remedies for dealing with incipient restraints than those courts have always possessed and

exercised in dealing with consummated restraints and monopolies.

Section 11 of the Clayton Act, on which appellant relies, does not even purport to deal with the equitable powers of the federal courts. Appellant argues that the section by implication restricts the plain meaning of the words of Section 15 and deprives the federal courts of the equitable discretion that they have traditionally exercised. This argument is in direct conflict with decisions of this Court holding that the equitable jurisdiction of the federal courts is not to be denied or limited except by a clear and unequivocal legislative command. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398; *Hecht Co.* v. *Bowles*, 321 U.S. 321, 330.

Even if complete divestiture were a mandatory remedy in administrative proceedings brought under Section 11 it would not follow that the equitable powers of the federal courts are similarly restricted. Administrative agencies differ in their origins and functions from the federal courts and are subject to limitations that Congress has not imposed upon those courts. It is therefore unnecessary for this Court to decide in this case what meaning should be given to Section 11 as applied to administrative proceedings.

In fact, however, complete divestiture of the legal title is not a mandatory remedy in proceedings brought under Section 11. The language of Section 11, read as a whole, shows that its reference to divestiture should be construed as permissive and not mandatory. Appellant's argument overlooks the fact that on any view Section 11 refers to divestiture only of stock held "contrary to the provisions of" Section 7 and hence is

by its terms inapplicable to stock which by other remedial measures has been deprived of all the potentialities which Section 7 proscribes. The Interstate Commerce Commission, which exercises enforcement powers under Section 11, has held that divestiture is not a mandatory remedy in Section 7 cases. The Federal Trade Commission has also taken action inconsistent with appellant's construction of Section 11. No court has ever held that complete divestiture of the legal title is a mandatory remedy under Section 11.

There is no substance in appellant's final suggestion that divestiture is the "normal" remedy in all but "exceptional" cases and that this case is not exceptional. Since "equity decrees are not like the packaged goods this machine age produces" it may be questioned whether any particular remedy can accurately be described as "normal" in an equity case. In any event this case is exceptional by any standard. Thirty years elapsed between du Pont's open acquisition of a substantial stock interest in General Motors and the bringing of this suit. In this long intervening period of time there has been a wide dispersion of ownership of the stock of both du Pont and General Motors, the value of the General Motors stock has enormously increased and there have been substantial changes in the tax laws. These are the conditions that make divestiture of the legal title inappropriate so long as another effective remedy is available. No comparable situation has ever existed in any other case brought under Section 7 or indeed in any case arising under the Sherman Act.

ARGUMENT

The District Court found the relief embodied in its judgment to be fully effective to eliminate the "effects of the acquisition offensive to the statute" and at the same time to be appropriate to meet "the exigencies of the particular case." It thus applied the standard laid down by this Court. See 353 U.S. at p. 607. Appellant now attacks the exercise of the "large discretion" declared by this Court to repose in the District Court (*ibid.*) on the single ground that though the judgment divests du Pont of all voting rights in the stock and of any right to be represented on the Board or in the management of General Motors, it does not provide for divestiture of du Pont's legal title to the General Motors stock. Appellant concedes that the plan for accomplishing divestiture of the legal title which it urged upon the District Court cannot now be defended, but insists that du Pont should be ordered by this Court to devise some other appropriate way to accomplish this divestiture.

Appellant does not deny that divestiture of the legal title would inflict hardship upon the stockholders of both du Pont and General Motors. Instead it argues that the hardship is largely irrelevant, and that insofar as it is relevant it will not be "undue". The issue thus drawn between the parties does not relate in any degree to any hardship that may be imposed upon du Pont in its corporate capacity or in its commercial operations. The opinion of the court below shows that it was not moved by, and indeed did not consider, hardship of that character, and du Pont has never suggested that it would be unwilling to divest itself of the legal title to the General Motors stock when that can be done without injury to innocent shareholders.

The central issue on this appeal, therefore, is whether the District Court properly exercised its discretion in declining to order divestiture of the bare legal title to the General Motors stock held by du Pont with the resulting hardship to innocent shareholders when, as we shall show, it entered a judgment that is effective to remedy the violation of Section 7 found by this Court.

We believe that the District Court properly exercised its discretion. It has formulated a judgment that is fully effective, and which at the same time avoids the drastic consequences to the hundreds of thousands of du Pont and General Motors stockholders inherent in the additional divestiture which appellant demands. In the terms of the mandate, it has decreed "the equitable relief necessary and appropriate in the public interest." Appellant has failed to show any sound basis for believing that the judgment will not "eliminate the effects of the acquisition offensive to the statute." Nor has appellant established that the additional divestiture which it seeks can be accomplished without imposing serious hardships on persons innocent of any wrong. Finally, there is no validity to appellant's contention that the District Court, sitting as a court of equity, was as a matter of law required to order divestiture of the legal title irrespective of whether that action was necessary to insure the effectiveness of the judgment, and irrespective of its inequitable consequences to third parties.

We deal with these points in that order.

I

THE JUDGMENT BELOW EFFECTIVELY ELIMINATES THE EFFECTS OF THE STOCK ACQUISITION FOUND TO BE OFFENSIVE TO THE CLAYTON ACT

The mandate of this Court directed the District Court to determine, after further hearing, "the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute" (R. 2). The effects of the acquisition which the Court found to be offensive to the statute lay in the "reasonable probability" that the acquisition might substantially lessen competition or tend to create a monopoly by giving du Pont an advantageous position as a supplier of General Motors. The District Court recognized that its "primary duty" was to frame a judgment that would effectively eliminate the effects of the acquisition which this Court found to be offensive to the statute.[4] Its judgment meets the standard laid down in the mandate.

A. *THE JUDGMENT EFFECTIVELY DIVESTS DU PONT OF ALL INCIDENTS OF THE OWNERSHIP OF THE STOCK THAT COULD BE USED TO INFLUENCE, OR THAT MIGHT HAVE ANY EFFECT ON, ITS COMMERCIAL RELATIONS WITH GENERAL MOTORS*

The judgment divests from du Pont all rights and privileges of the ownership of the General Motors stock

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[4] Appellant's suggestion (Br. p. 57) that the District Court in framing its judgment "gave primacy" to private stockholder interests is unwarranted. The opinion of the District Court is explicitly to the contrary (R. 3196):

> "The problem before this Court is one of devising a judgment that will effectively guard against the probability of restraint or monopolization which the Supreme Court found to exist.
>
> "• • • [T]he primary duty of the Court is therefore clear."

See also R. 3199, 3246-3247, 3249, 3263, and see pp. 54-56, *infra*.

that could be used to affect, or that might have any effect on, the commercial relations between the two companies. First, the judgment divests du Pont of all voting rights in the General Motors stock. It does this by directing that the voting rights of all of the stock held by du Pont, except that allocable to Christiana, Delaware, and the officers and directors of the three companies and their immediate families, shall be passed to and exercised directly by the stockholders of du Pont. The shares of stock allocable to Christiana and Delaware, and to the directors or officers of du Pont, Christiana or Delaware and their immediate families, are disenfranchised entirely.[5]

The divestiture of voting rights in the stock held by du Pont is supplemented by the provisions that prevent Christiana and Delaware, the officers and directors of those companies and their immediate families, and the officers and directors of du Pont and their immediate families, from exercising any voting rights with respect to stock in General Motors which they own directly.[6] Finally, the provisions divesting voting rights from du Pont are further supplemented by provisions that enjoin du Pont, Christiana and Delaware from using or attempting to use, directly or

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[5] This provision of the judgment disenfranchised 20,163,040 shares of General Motors stock at the annual meeting of General Motors held on May 20, 1960. See First Report of Monitor, p. 20.

[6] This provision of the judgment disenfranchised 1,513,536 shares of General Motors stock at the annual meeting of General Motors held on May 20, 1960. See First Report of Monitor, p. 20.

Sections VI B and X provide machinery to insure that the disenfranchisement provisions of the judgment are effective. Appellant's brief does not suggest that these provisions are inadequate to achieve their stated purpose. On the contrary, appellant suggests (Br. p. 83) that these provisions of the judgment, among others, should be preserved.

indirectly, any stock ownership in General Motors to influence or control General Motors in any manner whatsoever, and from attempting to influence, directly or indirectly, any person in any manner with respect to the exercise of voting rights in any General Motors stock.

To insure compliance with the provisions with respect to the voting rights the court provided for the appointment of a monitor to observe and report on the operation of the voting provisions of the judgment. A monitor was appointed (R. 3312) and supervised the voting at the annual meeting of General Motors stockholders held on May 20, 1960. A copy of his report, which was filed with and approved by the District Court, has been lodged with the Clerk of this Court. The monitor found that the voting provisions in the judgment had been strictly complied with at the General Motors annual meeting.[7]

Second, the judgment divests du Pont of the privilege, which may normally be exercised by a substantial stockholder, of being represented on the board or in the management of the company whose stock he

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[7] The monitor in his report concluded "'that the voting provisions of the final judgment have been faithfully carried out by the companies and individuals affected.'" The monitor further concluded specifically that du Pont, Christiana, Delaware and the directors and officers of those companies and the members of their immediate families did not exercise, directly or indirectly, voting rights in respect of General Motors stock that any of those companies or individuals held of record or had the power to vote or the power to direct the vote; that none of the persons nominated for election as a director of General Motors was a nominee or designee or representative of du Pont; and that none of the enjoined companies and individuals attempted to influence, directly or indirectly, any person in any manner with respect to the exercise of voting rights.

holds. Section IV of the judgment (R. 3302-3303) provides that General Motors may not knowingly have as a director or officer or employee any person who has served as a director or officer of du Pont, Christiana or Delaware any time after 90 days from the effective date of the judgment, and that the latter three companies may not knowingly have as a director, officer or employee any person who since that time has served as a director or officer of General Motors. The same section provides that du Pont, Christiana and Delaware may not in the future knowingly have an employee who is at the same time an employee of General Motors. The section further enjoins du Pont, Christiana and Delaware from nominating or proposing any person as a director or officer of General Motors, and provides that any person required by the judgment to withdraw as a director, officer or employee in any company shall not influence or participate in nominating his successor.

The effect of these divestiture provisions is to leave du Pont with a legal title to the General Motors stock that has been stripped of all of the rights of ownership except the right to receive dividends and the right to participate in the distribution of the assets of General Motors upon liquidation.[8] Since du Pont has

[8] The District Court noted that the divestiture and ancillary injunctive provisions of the judgment left du Pont with what the court characterized as "the most sterile kind of an investment" in General Motors stock (R. 3245). In fact, under the judgment the rights retained by du Pont are significantly less than those normally associated with the holding of a non-voting investment in a corporation. Du Pont has none of the rights of the holder of a bond or a debenture, or even of a general creditor. It likewise has none of the rights commonly associated with the ownership of preferred stock, as, for example, prior rights to the payment of dividends or the right to vote under certain circumstances.

consistently paid to its own stockholders the amount of all dividends received from General Motors, less the amount of the inter-corporate dividend tax, and since the liquidation of General Motors is hardly to be expected, the judgment as a practical matter leaves du Pont itself holding nothing except the bare legal title.[9]

Moreover, the incidents of stock ownership of which du Pont is now deprived by the divestiture provisions of the judgment are the very ones on which appellant has heretofore relied to establish the existence of du Pont's alleged control of, or influence over, General Motors. Appellant's briefs filed in the prior hearing in this Court, in arguing the question of this alleged "control", laid primary emphasis on du Pont's representation on the General Motors Board and on the committees of the Board and in the management of General Motors, and on du Pont's exercise of voting rights at the meetings of General Motors stockholders.[10]

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[9] There was uncontradicted testimony from the Treasurer of du Pont that the company's plans and projections for the future are based on the assumption that so long as it holds the stock in General Motors it will continue to pay the amount of dividends on that stock to its own stockholders (R. 1918). See also R. 3248.

[10] See *Brief for the United States*, United States v. E. I. du Pont de Nemours & Co., No. 3, October Term, 1956, pp. 18-24, 28, 90-92, 150-163.

It is generally recognized that power to control a corporation depends upon the exercise of voting rights, together with the power to choose directors that those rights confer. See, for example, Berle, *"Control" in Corporate Law*, 58 Col. L. Rev. 1212-1213 (1958):

"'Control' may be defined as the capacity to choose direc-

Indeed, in its present brief appellant concedes (pp. 44-45) that du Pont's alleged "influence" over General Motors arose "through membership on its board of directors and committees of the board, through influencing elections of board members and top executives, and through holding top executive positions * * *." All of these circumstances are directly traceable to du Pont's voting rights on General Motors stock. All have now been eliminated by the provisions of the judgment.

B. *OTHER PROVISIONS OF THE JUDGMENT SUPPLEMENT THE DIVESTITURE OF THE RIGHTS AND PRIVILEGES OF THE OWNERSHIP OF THE GENERAL MOTORS STOCK*

In addition to the divestiture provisions, the judgment contains injunctive provisions relating directly to the commercial relations between du Pont and General Motors. As pointed out above (pp. 9-10), several injunctive paragraphs prohibit any transactions or practices which might be used to preempt the General Motors market for the benefit of du Pont (R. 3303-3304). These provisions, for example, require the cancellation of any contracts under which General Motors purchases from du Pont any specified percentage of its requirements of any product and prohibits such contracts for the future, except that three years after

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tors. * * * Control is a function of the ownership of voting stock."

(*Id.*, p. 1224):

"Control is a function of the corporate mechanism as it presently exists in American law. It consists of the power to choose directors, and carries with it a measure of influence over them. It is exercised by a process—that of casting votes."

See also United States v. Union Pac. R. Co., 226 U.S. 470, 475.

the effective date of the judgment such contracts are permissible if limited to a period not longer than one calendar year or one automobile model year. Du Pont and General Motors are forbidden to engage in joint commercial enterprises, and General Motors is enjoined from dealing with du Pont with respect to any product, patent, process or discovery owned by General Motors on terms or conditions more favorable than those on which General Motors is willing to deal with competitors of du Pont. The District Court indicated that it was not satisfied that injunctive provisions of this scope were necessary but included them at appellant's request because they "may well contribute to an elimination of the consequence offensive to the statute * * *". (R. 3250).[11]

The District Court was satisfied, on the elaborate record before it, that its judgment was effective to eliminate the effects of the stock acquisition offensive to the statute. Yet it did not close its eyes to the possibility that experience might show that additional measures of relief were necessary. Section IX of the judgment (R. 3309-3310) provides that if the judgment shall prove inadequate to remedy the violation of the

[11] Injunctive provisions of this character were included by appellant in the judgment which it initially proposed to the District Court (R. 15-16). At the end of the proceedings below appellant renewed its insistence that the judgment should contain such provisions and indeed contended that they should be expanded beyond the limits that it first proposed (see R. 3279, *et seq.*). At the conclusion of its present brief appellant suggests (p. 83) that these provisions should be preserved. In view of these facts appellant is hardly in a position to suggest, as it does at pp. 50-51 of its brief, that these injunctive provisions are a "veiled recognition" by the District Court that the divestiture provisions of the judgment are inadequate.

Clayton Act any party may apply for a modification in the light of the circumstances then existing.[12]

This section of the judgment is in addition to, and not a substitute for, the conventional provisions whereby the court retains jurisdiction so that any party may apply for further relief (see Sec. XII, R. 3312). Section IX, therefore, specifically contemplates that further relief, even by way of divestiture of the legal title to the stock, may be obtained by appellant in the future on a lesser showing than would be required under the usual retention of jurisdiction clause.

The inclusion of this provision in the judgment is in accordance with the basic principle of equity that "An equity court may, by trial for a limited term, determine just how much relief is required to meet the situation, and thereby avoid unnecessary hardship to any of the parties."[13] This principle has been applied in the framing of equitable decrees in antitrust cases. See *Hartford-Empire Co.* v. *United States*, 323 U.S. 386, 408, *on rehearing*, 324 U.S. 573, 575, *affirming and modifying* 46 F. Supp. 541, 620-621 (N.D. Ohio 1942); see also *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 604.

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[12] Section IX also provides that any party may apply to the court for a modification of the judgment if there should be a change either by legislation or interpretation in the applicable tax law "which would substantially and significantly ameliorate the existing inequitable and burdensome tax consequences to du Pont stockholders attendant upon a distribution or other disposition of General Motors shares to du Pont stockholders * * *."

[13] See United Steelworkers of America v. United States, 361 U.S. 39, at pp. 71-72 (dissenting opinion), and cases and authorities there cited.

With Section IX in the judgment, appellant will not be prejudiced if experience shows that its asserted apprehensions are well founded. Time, as opposed to conjecture, speculation and assertion, will be the best test of the adequacy of the judgment. Section IX makes the test of experience feasible without injury to the public interest.

C. APPELLANT HAS NOT SHOWN ANY RESPECT IN WHICH THE JUDGMENT IS NOT FULLY EFFECTIVE

In now attacking the effectiveness of the judgment not on the basis of experience, but *in limine*, appellant assumes the burden of showing that the judgment on its face fails to deal adequately with the economic effect that this Court found to be offensive to the statute. That economic effect was the reasonable probability that the stock interest might give du Pont a preferred and non-competitive position as a supplier of General Motors. Appellant itself concedes that this was the economic effect "considered" by this Court in its ruling on violation (Br. p. 43). It follows that the standard to be applied in evaluating appellant's criticisms of the judgment is whether they demonstrate that the judgment fails to guard effectively against the possibility that du Pont by reason of its ownership of legal title to the General Motors stock, even though stripped of all right to vote or to be represented on the Board or in the management of General Motors, may enjoy a preferred position as a supplier of General Motors.

1. Appellant's most explicit argument in support of its contention that the judgment does not effectively deal with the probability that General Motors will favor du Pont as a supplier is that the voting rights in

a substantial block of General Motors stock will be exercised by a large number of du Pont shareholders (Br. pp. 44, 52-55). The force of this argument depends upon an assumption that is unwarranted in fact. There are in excess of 194,000 separate shareholders of record of du Pont (du Pont Exh. 50, R. 3057). Many of these record holders are trustees or nominees who would vote the General Motors stock in accordance with directions given by the beneficial owners.[14] The assumption therefore is that more than two hundred thousand separate and diverse shareholders of du Pont will exercise their General Motors voting rights cohesively or in concert and for the purpose of influencing the commercial practices of General Motors, or that in fear of the possibility of this concerted exercise of voting rights the management of General Motors will tailor its commercial practices to the benefit of du Pont. The District Court made an explicit finding that appellant "has made no showing that any such possibility exists and there is no basis in the record on which the Court could assume that anything of the kind could happen" (R. 3245).[15] Although appellant makes arguments inconsistent with this finding, it has

[14] There are more than 300,000 separate beneficial owners of du Pont stock (du Pont Exh. 24, R. 3030). The District Court after the trial on the merits found that the du Pont holdings of the du Pont family are concentrated in Christiana and Delaware, 126 F. Supp. 238-239; accordingly, since the judgment enjoins both Christiana and Delaware from voting any General Motors stock, voting rights in the General Motors stock owned by du Pont will be exercised almost entirely by the stockholders of du Pont who are not members of the du Pont family.

[15] In making this finding the District Court referred to "the number of stockholders, the diversity of their interests and the unlikelihood that General Motors trade policies could be influenced by actions taken at stockholders' meetings * * *" (R. 3245).

not expressly attacked it and makes no serious effort to show that the finding is not supported by the record.[16]

Moreover, appellant's argument is inconsistent with its own basic position throughout this litigation. Appellant has always argued, and continues to argue (Br. pp. 43-44), that when voting rights are widely dispersed among a large group of shareholders there is no real possibility that the exercise of those voting rights can control or influence corporate policy as against smaller but concentrated shareholdings.[17] The

[16] Appellant does not suggest any basis upon which the stockholders of du Pont even would know the state of trade relations between du Pont and General Motors. Any effort by du Pont to communicate such facts would violate Section VI A of the judgment (R. 3304), which enjoins du Pont, Christiana and Delaware, and their officers and directors, from "attempting to influence, directly or indirectly, any person in any manner with respect to exercising voting rights in respect of any General Motors stock • • •." The officers and directors of du Pont, who might have knowledge of the commercial dealings between du Pont and General Motors, are also of course enjoined from voting. Section VI A.

[17] The fact that the voting rights in the General Motors stock will be distributed among and independently exercised by more than 200,000 separate and diverse stockholders makes the situation that will exist under the judgment altogether different from that which exists when stock is vested in a voting trustee and voted as a block. In the latter case there is a concentration of voting power that cannot exist under the judgment. For that reason, appellant's quotation from the opinion of the Securities and Exchange Commission in In the Matter of H. M. Byllesby & Co., 6 S.E.C. 639 (1940), dealing with voting trusts, is not in point (Br. pp. 47-48). Voting trusts further differ from pass-through voting in that, as pointed out by the Commission in Byllesby, (1) they can be dissolved, with a restoration of voting rights to the owners of legal title, and in fact are usually limited in duration by the very terms of the trust agreement; (2) the trustee is obligated to vote the stock for the benefit of the legal owners. It should be noted, however, that the Interstate Commerce Commission which, like the

fact is that with the distribution of the voting rights to the shareholders of du Pont and the disenfranchisement of both the General Motors shares allocable to, and the General Motors shares held directly by, Christiana and Delaware and the officers and directors of those two companies and of du Pont, the only concentrations of General Motors voting rights will be in the hands of persons and institutions some of whom are related to the management of General Motors and all of whom are unrelated to the management of du Pont (App. Exh. 146, R. 2702-2704). When it is considered that the management of General Motors will have control of the proxy machinery, the suggestion that the exercise of voting rights by more than two hundred thousand widely dispersed stockholders of du Pont will or can have any influence on the management policies

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Securities and Exchange Commission, is charged with statutory responsibilities and has special competence and experience in the field of corporate control, has held that in appropriate circumstances the divestment of voting power through a voting trust is appropriate and adequate relief in a Section 7 case. See pp. 131-133, *infra*.

Of the Securities and Exchange Commission cases cited by appellant, not one held that "control", or even the lesser "controlling influence", existed in a situation where the allegedly controlling company owned no stock in the alleged subsidiary which possessed present voting rights and no stock which would in the future acquire voting rights. In the Matter of The United Corp., 13 S.E.C. 854 (1943), and In the Matter of Manchester Gas Co., 7 S.E.C. 57 (1940), dealt with situations that are in no degree comparable to the situation that will exist under the judgment here. In each of those cases either present or definite future voting rights existed.

Appellant itself has recognized that non-voting stock does not have the potential consequences under the antitrust laws that attend voting stock. In United States v. National Food Products Corp. (S.D.N.Y. 1926), Decrees and Judgments in Civil Federal Antitrust Cases, p. 1247, a consent decree approved by appellant in a Section 7 case limited the injunctive provisions against future acquisitions of stock to "any shares of voting stock". *Id.*, p. 1248.

of General Motors does not come within any measurable distance of reality.[18]

A further persuasive answer to appellant's argument with respect to the exercise of voting rights by the du Pont stockholders is to be found in the attitude of appellant throughout these relief proceedings. Appellant has never suggested that the court should take any affirmative step to guard against the exercise of voting rights in General Motors stock by du Pont shareholders. On the contrary, appellant itself proposed that for substantial periods of time du Pont stockholders should exercise those voting rights. The plan presented by appellant to the District Court provided that the voting rights on all of the General Motors stock owned by du Pont throughout the ten years in which the General Motors stock was to be sold or distributed should be exercised by the body of its shareholders excluding Christiana, Delaware and the stockholders of Delaware (R. 13-14). Similar voting provisions are contained in the more vague proposals now advanced by appellant in this Court (see Br. p. 83). Since appellant has insisted throughout that the judgment should forbid interlocking directorates and common officerships (R. 16)—conditions which appellant asserts are likely to influence

[18] Control of the proxy machinery is one of the most important elements in corporate control. In fact it has been said: "When there is no substantial minority and the stock is widely scattered among a large number of stockholders capacity to direct the proxy machinery is all that is necessary." Berle, *"Control" in Corporate Law*, 58 Col. L. Rev. 1213 (1958). This is substantially the situation that would exist under the judgment since, as has been pointed out above, the only concentration of voting stock would be in the hands of persons or institutions unrelated to the management of du Pont and many of whom are related to the management of General Motors.

the commercial practices of General Motors—the contrast suggests that appellant itself has not taken seriously the apprehensions that it now expresses as to the effect of the exercise of voting rights in General Motors by du Pont stockholders.

Indeed, appellant has never proposed that the court take any steps to assure that a substantial block of the stock in General Motors will not be voted by shareholders of du Pont after the completion of the process of divestiture of the legal title which it seeks. Appellant does not suggest that it anticipates that divestiture of du Pont's legal title to the General Motors stock will result in the separation of any substantial amount of the stock from ownership by du Pont stockholders. In fact, under appellant's proposals du Pont shareholders could continue indefinitely to hold and to vote a substantial percentage of the outstanding stock of General Motors. Nothing in the plan advocated by appellant in the court below or in the more vague proposals which it advances in this Court makes any provision against this possibility. On the contrary, appellant's proposals consistently have contemplated that divestiture of the legal title may and should be achieved by disposition of the stock to persons or institutions who are also shareholders of du Pont.[19] Thus appellant suggests (Br. pp. 67-70) that du Pont should divest itself of the legal title by distributing the General Motors stock to its own stockholders. More than that, in contending that du Pont could sell the stock by public or private sale without substantial adverse impact on the market price of General Motors, appellant has always relied heavily

[19] Indeed, appellant's plan in the court below even contemplated the granting of options to existing du Pont shareholders to purchase additional shares of General Motors stock. See App. Br. p. 9; R. 14-15.

upon the demand for common stocks existing on the part of institutional investors such as insurance companies, investment trusts, mutual funds, pension funds, and the like, which commonly own both du Pont and General Motors stock (Br. p. 78).[20]

Surely, if there were a real danger that the exercise of voting rights by the stockholders of du Pont would influence the commercial policies of General Motors, appellant would have proposed some measures to protect the public interest against this danger.[21] The

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[20] The record shows that it is usual for such institutional investors to own both du Pont and General Motors stock. See, for example, du Pont Exhs. 45 and 46, R. 3051-3052A; GM Exh. 11, R. 3115; Chr. Exhs. 17-19 (not printed); App. Exhs. 70-71, R. 2682-2683; R. 353, 565, 813, 1799, 1833.

Even if it is assumed that upon a distribution of the General Motors stock to du Pont stockholders the tax consequences would be so harsh that many stockholders would be forced to sell General Motors—a proposition that appellant does not embrace—the fact remains that appellant's own economic evidence is directed to establishing that these sales would have no impact upon the market because the stock thus sold would be acquired in large part by institutional investors who are themselves owners of du Pont stock.

[21] If there were a real danger that the exercise of voting rights in General Motors stock by du Pont stockholders would lead to consequences offensive to Section 7 of the Clayton Act, that danger could be dealt with only by a judgment that prohibited du Pont from selling or distributing any of the stock to anyone who was a shareholder in du Pont. Appellant has never advocated that measure of relief. On the contrary, appellant has apparently recognized, as we have pointed out above, the impossibility of disposing of the stock only to persons who are not and would not become stockholders of du Pont. Any attempt thus to restrict the disposition of the stock would have market consequences which presumably even appellant would recognize to be "undue".

In view of appellant's position, it is unnecessary to discuss the cases which appellant cites (Br. pp. 52-55) for the proposition that divestiture should eliminate "all stock interest and voting rights on the part of both the divesting company *and its stockholders*". Even if the cases cited establish the asserted legal principle, appellant is not asking to have the principle applied in this case.

truth of the matter is that appellant is now attacking the judgment of the court below on the ground that it fails to deal with an apprehension to which appellant has attached so little importance that it has never asked for any relief against it.

It should be added that although appellant's attack upon the exercise of voting rights by the du Pont shareholders is unwarranted it does not, on any view, justify the proposals advanced by appellant. If it were believed that the exercise of these voting rights might create any possible problem, that problem could be effectively dealt with by a modification of the judgment that either (a) disenfranchised all of the General Motors stock held by the du Pont Company, as the stock allocable to Christiana, Delaware, and the individuals mentioned above is now disenfranchised, or (b) directed that the stock shall be voted at any meeting of the stockholders of General Motors in precisely the same proportion as all other General Motors stock is voted.[22] There is every reason to believe that, had appellant asked for provisions of this kind, they would have been incorporated in the judgment by the District Court, since that court gave appellant substantially all of the relief it requested, save only the divestiture of the legal title of the stock from du Pont. In any event, du Pont would have no objection to a modification of the judgment along either of these lines, although it believes that the modification is unnecessary to the effectiveness of the judg-

[22] A provision of the latter kind would avoid possible quorum problems for General Motors but would make the voting of the stock, under the supervision of the District Court, a mandatory and purely ministerial act. The stock would have no independent voice in corporate elections since its division would be determined mechanically by the votes of the other shareholders.

ment and is not justified by the record or by any of the arguments now advanced by appellant.

2. Appellant also refers (Br. p. 42) to the fact that under the judgment du Pont will continue to receive dividends on the General Motors stock.[23] Appellant does not attempt to articulate the reasons why the payment of dividends by General Motors to du Pont on exactly the same basis and in exactly the same way that it pays dividends to more than 700,000 other stockholders should lead General Motors to favor du Pont as a supplier. Indeed, the contention cannot survive articulation, much less analysis.

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[23] Appellant refers (Br. p. 45) to the increase in the dollar amount of du Pont's sales to General Motors in 1955-1957 as compared with 1947. In view of appellant's statement in the District Court that its proposed judgment "would not forbid General Motors to do business with du Pont, nor would it necessarily restrict the amount of such business" (R. 70), the dollar amount of the sales has no relevance to the issues here. Moreover, when appellant offered the evidence as to the course of trade relations to which it now refers, it stated (R. 901): "Let it again be clearly understood that the Government suggests no improper conduct on the part of the companies by the introduction of this evidence." See also R. 3259. In any event, the increase in the dollar amount of the purchases may reasonably be attributed to increases in the price level and the fact that General Motors' unit sales of cars and trucks almost exactly doubled in 1955-1957 over 1947. Moody's, Industrials, 1956, p. 2508; 1958, p. 2580. It does not indicate the position of du Pont as a supplier to General Motors as compared with the position of du Pont's competitors, as to which appellant offered no evidence.

Appellant's reference (Br. p. 42) to the fact that in the 40 years that have elapsed since du Pont's acquisition of the stock of General Motors the stock has greatly increased in value is so plainly irrelevant to the question whether the judgment effectively guards against the economic consequences offensive to Section 7 that it requires no discussion.

Moreover, appellant's argument is again vitiated by its own conduct. Appellant did not at any time ask the District Court for any relief whatsoever with respect to dividends. It was content, in its proposed judgment, to permit du Pont to continue to receive dividends from General Motors throughout the ten years contemplated by its plan of divestiture. Since it has been the consistent practice of du Pont to pass on to its own stockholders the amount of the dividends it receives from General Motors, less the amount of the intercorporate dividend tax (R. 1913), a provision in the judgment requiring du Pont to continue to do so would not have changed the practical situation. Presumably for this reason appellant did not ask the District Court to include a provision of this kind in the judgment. See R. 3243-3244.

Nor has appellant asked in its proposals to this Court that du Pont be required to pay to its stockholders the amount of any dividends received from General Motors. On the contrary, appellant's proposals contemplate that for the period of time during which the divestiture it proposes is to be accomplished, dividends would continue to be paid to du Pont without restriction as to their use or disposition. Were there any danger inherent in the possibility of retention of dividends from General Motors by du Pont, it may be assumed that appellant would have sought relief on this matter in the District Court. Since appellant has not sought such relief, it seems reason-

able to assume that this asserted danger cannot be of any substantial consequence.[24]

3. Appellant makes several lesser assertions in support of its contention that because the judgment does not divest du Pont of the bare legal title, it fails to guard against the danger that General Motors will favor du Pont. It does not attempt to support these assertions by reference to the record or by specific argument or analysis. Thus, appellant asserts that "investment bankers and large creditors have long

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[24] We should perhaps note the proposal made in the closing pages of appellant's brief (pp. 80-81) that this Court should direct the District Court immediately to enjoin du Pont from receiving dividends "if divestiture has not been commenced pursuant to a plan approved by the court within one year after this Court's judgment is filed with the district court • • • such injunction to terminate on entry of a judgment of divestiture." This suggestion is plainly not designed to guard against the possibility that the payment of dividends will cause General Motors to favor du Pont, since the injunction is to terminate upon the entry of a judgment of divestiture, and the dividends may thereafter be paid to du Pont on the stock it holds throughout the period of time during which divestiture is being accomplished. Indeed, it is apparent that the purpose of this suggestion is to penalize the du Pont stockholders by depriving them temporarily of the dividends that they would otherwise receive unless the District Court complies with appellant's standards of expedition and avoids what appellant describes as "misorientation" of the relief proceeding. As we have shown at p. 6 n., *supra*, appellant's criticism of the lapse of time between the mandate of this Court and the entry of the final judgment below is unjustified, and is an attempt to shift to the District Court the responsibility for delay which was largely caused by appellant.

The normal, appropriate and just way for an appellate court to control the activities of a lower court and of litigants is to do so by specific directions to them in the mandate. There is neither precedent nor justification for appellant's suggestion that the conduct of litigants or the exercise of judicial discretion should be indirectly coerced by the imposition of penalties on innocent bystanders.

been known to possess extensive power over corporate management without the right to vote a single share of stock" (Br. p. 44). Whatever validity there may be in the assertion, it has nothing to do with the present case. To the extent that investment bankers may be thought to have power over corporate management it must arise either from directorships or from control over access to capital.[25] Under the judgment du Pont will not be represented on the Board of General Motors and it clearly can have no control or influence over General Motors' access to capital. The judgment does not leave du Pont any right possessed by a creditor.[26]

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[25] Under modern conditions, it is doubtful whether investment bankers can exert any measure of control or influence over a large corporation by restrictions on its access to capital. See Berle, *The 20th Century Capitalist Revolution* (1954), pp. 40-41. Where influence or control by investment bankers may be said to exist, it derives from membership on the board of directors (*e.g.*, McLean Trucking Co. v. United States, 321 U.S. 67, 95 (dissenting opinion); United States v. W. T. Grant Co., 345 U.S. 629, 636-637 (dissenting opinion); United States v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D.N.Y. 1953)).

[26] The situation that will exist under the judgment thus differs from the situation before the Court in Continental Insurance Co. v. United States, 259 U.S. 159, relied upon by appellant (Br. pp. 49-50). In that case the judgment that was modified by this Court had left untouched a pre-existing general mortgage to third parties under which the properties of both the defendant railroad company and the defendant coal company were liable for the whole amount of the indebtedness, and had provided that the railroad should receive bonds of the coal company in consideration of its assumption of the portion of the mortgage debt secured by the properties of the coal company. Hence both companies were jointly liable for the same indebtedness and the railroad company was a mortgage creditor of the coal company. The judgment here leaves no similar relationships in existence and creates no comparable "community of operation" between General Motors and du Pont.

Appellant further suggests that "any conscientious management must, in handling other people's money, take into consideration the interests of those investors, as trustees do * * *" (Br. p. 44). Since the argument assumes that the management of General Motors will be "conscientious" in observing its fiduciary obligations the short answer to this contention is that the interests that the management must consider, in the discharge of those obligations, are the interests of all of the stockholders as stockholders, and not the interests of particular stockholders as suppliers or in any other business or financial capacity.[27]

Appellant then asserts that because the judgment leaves du Pont with a substantial financial interest in General Motors the mere existence of this interest necessarily creates the probability that General Motors will favor du Pont as a supplier (Br. p. 44). As we have pointed out above, the financial interest which du Pont retains in the General Motors stock does not entitle du Pont to exercise any voting rights in the stock or to be represented on the Board or in the management of General Motors. The interest gives du Pont none of the rights of a bondholder or even of a general creditor. The argument that such a financial interest creates any probability of the economic consequences that Section 7 was designed to prevent is answered by the terms of the section itself. The section is confined to the acquisition of stock and does not apply to the acquisition of bonds or other evidences of indebtedness. Indeed, the section does not even

[27] In its prior opinion in this case this Court negatived any notion that either the management of du Pont or the management of General Motors had disregarded its fiduciary obligations to the stockholders in the conduct of the commercial relations between the two companies. See 353 U.S. at p. 607.

apply to corporations "purchasing * * * stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition." This provision is a plain Congressional recognition that the holding of a financial interest, even in the form of stock, does not, in itself, tend to create the effects offensive to the statute.

Finally, appellant asserts generally that "practices and viewpoints developed during many years of du Pont's active and prominent participation in General Motors management—through membership on its board of directors and committees of the board, through influencing election of board members and top executives, and through holding top executive positions—would be likely to promote continuation of a du Pont-oriented management of General Motors". (Br. pp. 44-45). Three comments are warranted. First, every one of the specific activities or circumstances mentioned in the passage just quoted is now expressly forbidden by the judgment. Second, the argument rests upon an assertion as to the state of mind of the present management of General Motors which is unsupported by the record.[28] Third, if the putative situation asserted by appellant should be thought to exist appellant does not and cannot explain how the situation could be cured by the divestiture of legal title.

4. Perhaps the most significant evidence of appellant's own lack of confidence in its arguments that the judgment is not effective to prevent General Motors

[28] The evidence relied upon by appellant in the trial on liability to support its contentions as to the state of mind of the management of General Motors related to events occurring more than 25 years ago and involved men who are either dead or have long since retired from the active management of General Motors.

from favoring du Pont is the fact that in its brief it has chosen to rely initially upon the contention that the judgment is defective because it does not guard against the contrary possibility—that du Pont may favor or prefer General Motors (Br. pp. 41-43).

Appellant's assertion that its demand for divestiture of the bare legal title to the General Motors stock can be justified on this basis is remarkable in two respects. In the first place, the assertion turns this litigation upside down and seeks to justify relief on a ground which is inconsistent with the basis on which this Court, at appellant's instance, adjudicated liability. In the second place, the assertion asks this Court to decree a particularly drastic form of relief on a record that is barren of evidence that would enable the Court to adjudicate the issues of both fact and law that the assertion necessarily raises.

The issue of liability in this case was tried in the District Court, and was adjudicated in this Court, on the basis of appellant's contention that du Pont's ownership of stock in General Motors had enabled or might enable du Pont to preempt the market represented by General Motors' purchases to the benefit of du Pont and to the detriment of du Pont's competitors. In the trial of that issue, appellant never rested its case on the charge that there was a violation of law because du Pont had given or was likely to give General Motors a non-competitive preference in the commercial dealings between the two companies.[29] Indeed,

[29] At an early stage in the trial on the question of liability appellant offered evidence designed to show that du Pont had for a time in the 1920's followed a policy of buying its requirements of motor cars from General Motors. Appellant did not press the charge, and at the conclusion of the trial it neither argued the point nor requested any findings of fact or conclusions of law relating to it. See R. 3259. There was no reference to the point in appellant's prior briefs in this Court.

the only significant evidence in the trial on the question of liability which even remotely relates to this subject is inconsistent with appellant's argument.[30]

Nothing in the entire record of the proceeding suggests the possibility, much less a probability, that du Pont's ownership of stock in General Motors would, or could lead du Pont to extend preferential, non-competitive treatment to General Motors. Accordingly, this Court has had no occasion to inquire whether there is such a possibility, and necessarily it has not determined the economic consequences of such a preference if one should ever occur. There is no basis on which these determinations could be made except by resort to the most arbitrary assumptions.

Appellant makes no attempt to substantiate its argument but relies simply upon the bare assertion that du Pont will favor General Motors because of du Pont's "continuing interest" in the success and profits of General Motors (Br., pp. 41-42). Appellant is thus asking this Court to assume, not on the basis of any facts or findings, but simply as a general

[30] In 1922, after the invention of "Duco", General Motors asked du Pont for exclusive or preferential rights to its use. Du Pont refused, on the ground that it did not wish to prejudice its relations with other purchasers. See the following exhibits in the record in United States v. E. I. du Pont de Nemours & Co., No. 3, October Term, 1956 (DP 211-212, GTX 377, 380, 382, GTX 406, p. 12). Several years later, when "Dulux" was invented by du Pont and developed by it as a refrigerator finish, it was first offered to and used by General Electric Company, General Motors' principal competitor in the refrigerator field. *Id.*; R. 2383-2385, 2405. Similarly, when in 1931 du Pont developed neoprene, which was the first synthetic rubber ever made on a commercial scale in the United States, the product was not offered on an exclusive basis to General Motors but on the contrary du Pont worked with other companies in developing the use of neoprene in the automobile industry. *Id.*, R. 2505-2507, 2510, 2511-2512.

proposition, that the existence of a financial interest is likely to lead to effects offensive to Section 7. The terms of the section itself deny the validity of this proposition. In drafting Section 7 Congress did not accept or act upon any assumption that the mere existence of a financial interest will tend to create restraints or monopolies. The section does not read upon financial interests as such; as we have pointed out above it does not apply to the acquisition of bonds or other evidences of indebtedness or even to the holding of stock acquired for investment and not used to restrain or monopolize trade. *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, 298; *Aluminum Co. of America* v. *Federal Trade Commission*, 285 Fed. 401, 405 (3d Cir. 1922), *certiorari denied*, 261 U.S. 616.

Appellant does not attempt to demonstrate by reference either to history or to pure imagination or hypothesis how it would in fact benefit du Pont to favor General Motors, or how du Pont could do so without seriously prejudicing its relations with other customers and industries to its own financial disadvantage.[31] Appellant merely assumes the existence of products or processes, and of circumstances, which would make favoritism of General Motors financially practical and attractive to du Pont. Since any

[31] The relationship between du Pont's sales to General Motors and its total sales to all customers creates a strong inference that du Pont would have no incentive to favor General Motors at the expense of jeopardizing its relations with other purchasers. On an average in recent years du Pont's sales to General Motors have been only approximately 3 percent of its total sales. In 1957, for example, du Pont's total sales to General Motors amounted to $52,803,772 (App. Exh. 179, R. 2572-2754), whereas its total sales to all customers in the same year were some $1,965,000,000 (App. Exh. 692, p. 6, R. 3018)

attempt to give substance to this assumption would require the postulation of a chain of implausible hypotheses, it is not surprising that appellant is content to rely upon general assertions. In any event, appellant is in no position to argue that du Pont would be tempted to favor General Motors because du Pont's stockholders would continue to receive the amount of General Motors dividends, since appellant's own proposals contemplate that stockholders of du Pont may continue to hold and to receive dividends on a substantial percentage of the stock of General Motors (Br., pp. 37-39).

The invalidity of appellant's argument is disclosed by the terms in which it is stated. It is not documented by any reference to facts, either in or *dehors* the record. Because of the absence of evidence it is not and cannot be directed, even on a speculative basis, to any specified or particular kinds of preferential arrangements. And the only economic consequence to which appellant points (Br. p. 42) as justifying the argument is the apprehension that by reason of some undefined preference the power and the position of General Motors in the automobile manufacturing industry may be increased. Thus, for the purpose of justifying its attack on the judgment, appellant is attempting to transform a lawsuit that was litigated to remove restraints from the market represented by General Motors' purchases into a lawsuit to reduce the power and influence of General Motors as a manufacturer of automobiles.

But even this attempt does not mark the outermost limits of appellant's contention. Appellant asserts in the broadest terms that it was the duty of the District Court in framing its judgment to deal with "all the other business and financial relationships or fields of

possible competition between the two companies and between each of them and other chemical and automobile concerns" (Br. p. 43). In short, appellant contends that the effectiveness of the judgment must be measured by its effect on all possible restraints that may occur with respect to any commodity in any market in which either du Pont or General Motors competes with others. And appellant makes this contention even though the record contains no evidence whatsoever with respect to what those markets may be, or with respect to any economic consequences that might occur in those markets as a result of any preferences that might conceivably be given by du Pont to General Motors.

Appellant's contention does not raise the question whether a court that has adjudicated the illegality of a particular practice may, in granting relief, extend the provisions of its judgment to related practices directed to the same market which the defendant has been found to have restrained. This the District Court has done; both the divestiture and the injunctive provisions of the judgment have a scope beyond the particular commodities—automobile fabrics and finishes—as to which this Court found the probability of restraint.

Nor does appellant complain that the District Court unduly limited the injunctive provisions of the judgment. Indeed, the judgment contains express injunctive relief against the possibility that du Pont might favor General Motors. The court included in the judgment a provision that enjoins du Pont from dealing with General Motors with respect to du Pont products or processes on terms or conditions more favorable than those on which du Pont is willing to deal with competitors of General Motors (Sec. V. C, R. 3304). In

doing so the court indicated that it adopted this provision—improperly, in our view—"out of deference * * * to the Government's naked suggestion that du Pont might favor General Motors rather than on the basis of any proof that du Pont has favored General Motors * * *" (R. 32 0).[32]

Since appellant thus has obtained unjustified injunctive relief against the possibility that du Pont may favor General Motors, the real question is whether appellant may now justify its further demand for divestiture of the legal title to the General Motors stock by relying upon claims or causes of action that have never been adjudicated by any court, and that relate to apprehended restraints and to markets that have never been delineated and as to which the record contains no evidence.

There is no authority that justifies the drastic relief of divestiture on any such basis. The three cases cited by appellant in support of its argument (Br. p. 43) show that even in framing purely injunctive relief the courts do not sanction the extreme position now advocated by appellant. In *Hartford-Empire Co.* v. *United States*, 323 U.S. 326, 409, in the passage of which appellant quotes a part (Br. p. 43), the Court said that an equity decree in an antitrust case should not attempt to enjoin "all possible breaches of the law." In that case the Government itself conceded that the District Court had erred in granting an injunction that forbade certain practices with respect to patents on all kinds of inventions, and this Court accordingly limited the injunction to patents on glassmaking machinery and

[32] Although we believe that in this respect the District Court went beyond the permissible limits of discretion, this question is not presented here because no appeal from the judgment was taken by du Pont.

glass-ware as defined in the judgment. See 323 U.S. at pp. 422-423.[33] In *International Salt Co.* v. *United States*, 332 U.S. 392, 400, the Court justified the particular injunctive provision there in question on the ground that it was appropriately designed to prevent the defendant from restraining the same market in which it had attained an advantage by unlawful methods.[34] The case does not stand for the proposition that because a defendant has been found to have violated the antitrust laws with respect to one market, relief should be awarded based upon assumed activities in a totally different market as to which there has been no adjudication. Similarly, in *United States* v. *United States Gypsum Co.*, 340 U.S. 76, the language quoted in appellant's brief (p. 43), was preceded by the statement that injunctive relief must be con-

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[33] The Court in that case also eliminated another provision of the judgment below on the ground that it did not appear "to be addressed to any practice indulged in or threatened by any of the appellants". 323 U.S. at p. 418.

In Schine Chain Theatres v. United States, 334 U.S. 110, at pp. 120-121, the Court struck an injunctive provision in the trial court's judgment on the ground that there was no finding which justified the conclusion that the practice enjoined was a part of, or contributed to, the illegal conduct and consequences charged and adjudicated below.

[34] The precise point involved was a narrow one. The defendant had been found to have violated Section 1 of the Sherman Act and Section 3 of the Clayton Act by leasing patented machines on condition that the lessees would use only the defendant's salt in the machines. The Court held that it was proper for the judgment to require the defendant to lease the machines on non-discriminatory terms, even though there had been no evidence, apart from the tying clause, that the defendant had practiced discrimination.

fined to "practices connected with acts actually found to be illegal." 340 U.S. at p. 89.[35]

This Court has taken the position that the drastic relief of divestiture should be ordered only on the basis of clear findings, adequately supported by evidence of record, as to the illegality of the economic consequences that divestiture is proposed to dissipate, and as to the nature, scope and degree of divestiture appropriate to this end. *Schine Chain Theatres* v. *United States*, 334 U.S. 110, 129; *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 172-174. See also *Hughes* v. *United States*, 342 U.S. 353, 357-358.

In the present case, there are no findings that support the proposition that the relief that appellant now seeks is necessary to suppress or negate a probability that the financial interest of du Pont in General Motors will result in consequences unlawful under Section 7 by reason of favoritism by du Pont of General Motors. Nor is there any evidence of record from which such findings could be drawn, for the question whether du Pont's financial interest in General Motors —even with the incidents which it possessed prior to the decree of the District Court and *a fortiori* as sterilized by that decree—produces a probability of such consequences has never been litigated in or adjudicated by any court. Under such circumstances appellant is in no position to ask this Court to order the drastic relief of divestiture in order to guard against a hypothetical danger, or to undo a hypothetical illegal achievement, which has never been the subject of liti-

[35] The modifications of the judgment approved by this Court were directed to practices closely related to those found to have been unlawful and were confined to the particular products involved in the litigation.

gation and which has existence only in bare assertion and abstract speculation.

II

THE ADDITIONAL DIVESTITURE OF THE LEGAL TITLE TO THE GENERAL MOTORS STOCK CANNOT BE ACCOMPLISHED WITHOUT SERIOUS HARDSHIP TO STOCKHOLDERS OF DU PONT AND GENERAL MOTORS

The District Court did not reject appellant's proposal for divestiture of the legal title to the General Motors stock on the theory that it was required to give primary consideration to the interests of the stockholders of du Pont and General Motors. The court recognized that its primary duty was to frame a judgment that would effectively eliminate the effects of the stock acquisition that were offensive to Section 7. At the same time the District Court recognized that in choosing between different effective methods of eliminating those consequences it was required to take into consideration the effect that each might have upon the property interests of the shareholders of the two companies involved (R. 3196-3197).[36] The prin-

[36] The District Court indicated that in its view the unusual circumstances of this case, growing out of the fact that between the time of the acquisition and the bringing of suit by appellant some 30 years later there had been such an increase in the number of stockholders of the corporations involved that the rights of more than one million persons were affected, made consideration of the consequences which any decree would have for these intervening stockholders particularly appropriate. See R. 3197.

It may also be noted that the unusually drastic tax and market consequences of any divestiture of legal title in the particular circumstances of this case, which will be discussed below, would in large measure be the result of the very substantial appreciation in the value of General Motors stock, and of changes in the tax laws, during this 30-odd year period.

ciple upon which the District Court acted is clearly stated in its opinion (R. 3249):

> "'Because divestiture of the legal title is not necessary to remove the consequences of the acquisition found to be offensive to the statute, the Court concludes that it would be unfair and repugnant to the principles of equity to impose injurious consequences upon the stockholders of du Pont and General Motors by requiring the divestiture of the legal title.'"

In its approach to the problem of relief, the District Court thus recognized and applied principles that have been laid down by this Court, notably in *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185, where this Court said that in the formulation of antitrust decrees the "dominant influences" that "must guide our action" include, in addition to "the duty of giving complete and efficacious effect to the prohibitions of the statute," and the "accomplishing of this result with as little injury as possible to the interest of the general public"—

> "a proper regard for the vast interests of private property which may have become vested as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs * * *."

As we have shown above, the judgment entered by the District Court is effective to eliminate the effects of the stock acquisition that are offensive to the statute. On this basis alone the judgment of the lower court should be affirmed as a proper exercise of its discretionary equitable powers. In these circumstances appellant is in no position to complain because the Dis-

trict Court in rejecting the alternative form of relief proposed by appellant considered whether that relief would inflict unnecessary hardship upon the shareholders of du Pont and General Motors.

Appellant does not ask this Court to reject the findings of the District Court that the plan of divestiture proposed by appellant would have inflicted serious hardship upon the stockholders of du Pont and General Motors (Br. pp. 64-65). Appellant insists, however, that even if its plan of divestiture was properly rejected, divestiture of the legal title to the General Motors stock is possible without "undue" hardship to the stockholders of the two companies.

Appellant in this Court declines to accept responsibility for the plan it proposed below or, indeed, for any particular plan for accomplishing this divestiture. Instead it discusses in general terms alternative methods of disposing of the stock and attempts to create the impression that there are ways in which this disposition could be achieved without hardship to the shareholders. It is on this basis that appellant asserts that du Pont should be ordered to divest itself of the stock by any one or more of the asserted alternatives at its option. This method of dealing with the problem doubtless has the advantage of appearing to relieve appellant of any responsibility for what may happen to the property interests of approximately one million shareholders of the two companies. It is hardly, however, sufficient recognition of the practical problems that this Court must face in deciding whether divestiture of legal title is to be ordered, or of the practical consequences that such a divestiture order would have for these shareholders.

Furthermore, appellant's method of presentation does not enable it to avoid the effect of the findings

made by the District Court. When appellant's proposals are examined, it appears that the alternatives it now advances are subject to the same basic infirmities as the now-abandoned plan that it pressed upon the District Court. Only by distribution or by sale of the General Motors stock or by a combination of the two could du Pont obey the newly-proposed "single, basic command" which would order it "to divest its entire holding ratably over a stated period, i.e., ten years" (Br. pp. 65, 28). These two methods of disposition were the essence of the plan appellant urged upon the District Court. These were the methods of disposition that the District Court found would cause a severe tax impact and a serious depression of market values. The serious impact these methods of disposition would have upon individual stockholders can in no way be blunted or softened by the theoretical availability of certain impractical alternatives now suggested by appellant.

The consequences that the District Court found would have attended the judgment originally proposed by appellant are the consequences that are inherent in the order of divestiture of legal title that appellant now urges. We propose, therefore, to summarize the nature and consequences of appellant's District Court plan in order to show the hardships that inhere in the proposal it now urges upon this Court.

A. *THE INJURY TO THE STOCKHOLDERS OF DU PONT AND GENERAL MOTORS THAT WOULD HAVE BEEN CAUSED BY APPELLANT'S FORMER PROPOSAL*

The injury that would have resulted from carrying out the judgment proposed by appellant below can be stated with considerable certainty. The inevitability of the tax consequences was not in dispute, nor was

their magnitude seriously in issue. The extent of the market consequences, although a matter of conflicting opinion between witnesses for appellant and for appellees, was exhaustively explored and was the subject of numerous findings that appellant now expressly declines to challenge (Br. pp. 64-65).

The proposal itself, so far as now material, can be briefly summarized. The essence of the proposed divestiture of legal title was the compulsory disposal by du Pont of its 63,000,000 shares of General Motors stock over a ten-year period. The disposition was to be accomplished by transferring the shares to a trustee. The trustee, in turn, was to have been directed to distribute them as dividends to du Pont stockholders over the ten-year period, except for the shares allocable to Christiana, Delaware and those du Pont stockholders who are also stockholders of Delaware. Instead of distributing these latter shares, which amount to about one-third of the total, the trustee was to have sold them over the ten-year period and to have distributed only the net proceeds. See R. 13-15; du Pont Exh. 51, R. 3057.

1. The tax consequences

There can be no doubt as to the manner in which the federal tax laws would have applied to appellant's proposal. The Commissioner of Internal Revenue ruled (R. 3171-3182) that the shares of General Motors stock that would have been distributed by the trustee to individual beneficial holders of du Pont stock during the ten-year period would have been taxed as ordinary income at their market value on the date of dis-

tribution.[37] Hence they would have been taxed at rates varying from 20 to 91 percent (less dividend received credits). To make this ruling meaningful in terms of all individual beneficial owners of du Pont stock, a study was made by an independent statistical organization. This study, which the court found reliable as indicating the order of magnitude of the total taxes payable (R. 3206), showed that as a group the individual beneficial owners of du Pont stock would have paid taxes on the General Motors stock at rates between 55 and 60 percent, and that the total federal income tax bill of these du Pont stockholders attributable to this distribution would have been between $770,000,000 and $1,000,000,000 over the ten-year period, depending on the market price of General Motors stock on the ten dates of distribution (R. 3205-3206). To this federal tax bill would have been added the additional amounts of state income taxes that many du Pont stockholders would have been required to pay (du Pont Exh. 54, R. 3058A-C).[38]

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[37] Precisely stated, the ruling provided that to the extent that the value of such shares exceeded du Pont's accumulated earnings and profits at the time of distribution such value would be taxed as a return of capital. Du Pont's accumulated earnings and profits from its chemical operations are such that this limitation would have had no practical application to the distribution proposed by appellant.

[38] In addition to the taxes on individual beneficial owners of du Pont stock, there would have been additional taxes paid by taxliable corporations that are beneficial owners of du Pont stock. They would have paid a much smaller amount, since the effective corporate tax rate is 7.8 percent, and is computed on du Pont's tax basis for the General Motors stock ($2.09) rather than on the market value as in the case of individuals. The total, notwithstanding these factors, would have been approximately $3,500,000 (du Pont Exhs. 24, 48, 51; R. 3030, 3053-3055, 3057). Moreover, two of these corporate holders—Christiana and Delaware—would have been required to pay not only these income taxes, but also

The tax consequences of the distribution can also be considered in economic terms. So considered, a du Pont stockholder who received his *pro rata* share of du Pont's General Motors stock would have received, in reality, a return of part of his capital; the value of his du Pont stock would have decreased proportionately. Were there no taxes on the transactions, at the end of ten years du Pont stockholders would have been in the same investment position as they were before the distribution began, except that their investment would have been represented by two stock certificates rather than one. Since taxes are imposed, in order to get the extra piece of paper each du Pont stockholder would have been required to forfeit from one-fifth to nine-tenths of the value of the General Motors portion of his investment. In other words, the billion-dollar tax bill would in economic terms have amounted to a massive capital levy upon the du Pont stockholders (R. 3210).[39] Moreover, this levy would have been distributed unequally and fortuitously among du Pont stockholders. It would have borne no necessary relationship to the number of shares of du Pont which they owned, to their participation in the management of du Pont or to their personal responsibility for or knowledge of the violation of Section 7. Even among

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capital gains taxes on the sales by the trustee of the General Motors stock allocable to them, which the court below found might well have exceeded $200,000,000, depending again on the prices which the trustee was able to realize (R. 3210). In addition, there would have been sales costs, including transfer taxes, on such sales which might have amounted to almost $30,000,000 (see Chr. Exh. 8, R. 3084C).

[39] This aspect of appellant's proposal was emphasized by Dean Neil H. Jacoby of the Graduate School of Business Administration of the University of California (R. 1720, *et seq.*). Witnesses for appellant gave testimony to the same effect. See Murray, R. 787; Shanks, R. 817-818.

du Pont stockholders with an equal number of shares, the amount of the tax imposed would have depended wholly on the amount of the taxpayer's entire net taxable income from all sources. See Jacoby, R. 1714, 1731.

Appellant cannot and does not attempt to deny that the effect of its proposal would have been to deprive each of the more than 230,000 men and women who are beneficial holders of du Pont stock of a portion of his capital investment (du Pont Exh. 25 (not printed)). Appellant does, however, attempt to belittle the injury thus imposed on the shareholders by pointing out that "on the average" holders of a relatively small number of shares would be taxed at a 30 percent rate and that only the stockholders with large income would pay taxes at higher rates (Br. p. 20 n.).[40] It is no solace to a shareholder whose savings have been impaired to be assured that other shareholders whose incomes are larger will lose an even greater portion of their capital. We submit that any argument that attempts to justify hardship upon shareholders in moderate circumstances on the ground that it will be inflicted to an equal or a greater degree upon the wealthy can hardly appeal to the conscience of a court of equity.

[40] In this respect the averages used by appellant do not truly indicate the impact of the tax upon individuals. The record shows that there are a substantial number of shareholders holding a relatively small number of shares who would be taxed at rates well in excess of 30 percent and a substantial number of relatively large shareholders who would be taxed at substantially less than the 80 percent rate. For that reason appellant's proposal would not have been a sure method of imposing taxes upon large and wealthy holders of du Pont stock (App. Exh. 563, R. 2896, 2913-2917).

In the same vein appellant deprecates the hardship by observing that persons who would be taxed at the 30 percent rate would pay *on an average* a tax of less than $50 a year, on the apparent assumption that a court need not be concerned about the hardship of a proposal which takes away in a ten-year period $400 or $500 of a man's or woman's savings. The use of averages, although inevitable for statistical purposes, obscures the fact that what is here involved is a capital levy upon the savings of more than 230,000 individual men and women and not merely an abstract problem of economic analysis. It is always easier to be cheerful or indifferent about injustice or injury inflicted upon others if their individuality and necessities as human beings can be buried in a statistical average. We assume that a court of equity will not be indifferent to the fact that among the 230,000 individual beneficial owners of du Pont there are many persons to whom the loss of $400 or $500 would be a real hardship.[41] And this result should be particularly offensive to equitable principles because it operates upon savings, and not upon profits or income.

2. The effect on the market values of General Motors and du Pont stock

To the tax penalties inherent in the proposal appellant urged upon the District Court would have been added the additional hardships visited on innocent persons by the market disturbances that would have resulted from the carrying out of the plan. They

[41] The tax impact of appellant's proposals upon particular shareholders is illustrated by the testimony of a number of those shareholders at the hearing below (R. 1412-1478).

would have fallen with severity on the stockholders of both General Motors and du Pont.[42]

a. The effect on the market value of du Pont stock

A major part of the drastic depression in the market value of du Pont stock would have been directly traceable to the tax consequences just considered. Had the judgment proposed by appellant been adopted, there would have been many du Pont stockholders who would have sold or offered to sell their du Pont stock in order to avoid the capital levy resulting from the impact of the taxes. Trustees, who hold a large amount of du Pont stock, would also have felt compelled to sell, for other reasons. At the same time, there would have been a reluctance on the part of either individual or institutional investors to become purchasers of du Pont stock. The cumulative effect of the increased offers to sell and the decreased buying interest would have put the market price of du Pont stock much below what it would otherwise have been. The court below found that the adverse consequences on du Pont stock prices would have been "substantial" (R. 3247).

There is no doubt that this finding is fully supported. First, as to those who would have offered du Pont stock for sale: One class of present du Pont stockholders who would have done so are those individual owners who are in relatively high income tax brackets and

[42] Appellant cannot dismiss the impact on the market price of General Motors and du Pont stock that would have been caused by its plan for divestiture by sale and distribution on the ground that this hardship would have been suffered only by the rich. The drastic market consequences that would have been caused by appellant's proposal would have fallen with as much severity upon a man who owned ten shares of General Motors or du Pont as upon a larger shareholder.

who have a relatively high tax base for their stock. As a simple matter of arithmetic, such du Pont stockholders would have saved by paying capital gains taxes upon any gain realized on the sale and putting the net receipts into some other investment. The figures in du Pont Exh. 34 (R. 3040A) chart this "break-even" point and furnish a measure of the harshness of the income tax penalties that would have been involved. See R. 1529-1531. For example, a stockholder in the 87 percent tax bracket would have been better off selling du Pont at $180 and paying a capital gains tax even if the tax basis for his stock was zero. Just how many shares would have been sold for these reasons cannot be stated exactly[43] but the witnesses agreed that the number would be substantial. See Emerson, 1527-1531, 1533-1534; Jacoby, R. 1715; Moses, R. 2011-2012; Lenz, R. 2086-2087. Appellant presented no evidence to the contrary.

Trustees would have been another large category of sellers of du Pont stock. Some 24 per cent of all du Pont stock is held by trustees (du Pont Exh. 24, R. 3030), and a variety of factors would have supplied the motivation for them to sell. Ralph Lowell, head of one of the largest trust institutions in New

[43] There are several factors to which the witnesses referred as making precise estimates impossible. No evidence was available from which to determine the tax basis for du Pont shares held by du Pont stockholders. Moreover, the break-even point would have depended on the future market price of both du Pont and General Motors. There would also have been persons who would not have sold for sentimental reasons, or because they hoped for changes in the tax laws, or because they could create personal holding companies and thus try to avoid individual income taxes. Some would not have sold simply because they would be unwilling to sacrifice their du Pont stock at a price substantially below its true worth. See R. 1533, 2087.

England, indicated that his company would have immediately disposed of all du Pont stock in its trusts except in the comparatively few in which it had the power to allocate the General Motors stock received as between life beneficiaries and remandermen, or in which the du Pont stock was held at such a very low tax basis as to make the capital gains tax on its sale unacceptable. The reason, as he explained, was that in Massachusetts (and in many other States[44]) the General Motors stock would have been allocable to income, but since it would have been, in reality, a distribution of a portion of du Pont's capital, aggrandizement of the life beneficiary at the expense of the remaindermen could have been prevented only by selling it. See Lowell, R. 1937-1939; see also Kennedy, R. 2178-2179. Indeed, one of the large trust institutions had already sold a substantial amount of du Pont stock at the time of the hearing in order to avoid the potential legal problems. See Kennedy, R. 2179; GM Exh. 12, R. 3115.

These various stockholders and trustees who would have been motivated to sell du Pont stock would, moreover, have faced a correlative decrease in available purchasers. Any individual purchaser would have been buying into a tax problem. Any trustee would have been buying not only into a tax problem but also into an allocation problem and possible litigation by life beneficiaries or remaindermen. Corporate investors, because they would have been taxed at substantially lower rates on the distribution of General Motors shares, would have been the probable purchasers. Their representatives made it clear at the

[44] See Uniform Principal and Income Act, Sec. 5(1), 9B Uniform Laws Annotated, pp. 373-374.

hearing, however, that they were fully aware of the selling pressures that the proposed judgment would have generated, and that they would have been reluctant to purchase du Pont stock until the price had fallen drastically. Such was the testimony of witnesses representing insurance companies (Caley, R. 1805-1806), mutual funds (Moses, R. 2012-2014), and securities dealers who had experience in selling to and buying for institutional purchasers (Emerson, R. 1534-1535; Lenz, R. 2089).

b. The effect on the market value of General Motors stock

The tax consequences considered above would also have played a significant part in the depression that would have occurred in the market value of General Motors stock. In this instance, moreover, they would have been combined with the market consequences of the substantial annual sales that would have been made by the trustee.

Under the plan, the trustee would have been required to sell each year, for ten years, approximately 2,000,000 shares of General Motors stock—the du Pont shares allocable to Christiana, Delaware and the stockholders of Delaware, plus one-tenth of the General Motors stock owned by Christiana itself.[45] In addition, there would have been substantial selling by du

[45] Under the provisions of appellant's proposed judgment the trustee would have received 63,000,000 shares of General Motors stock from du Pont and 535,500 shares from Christiana. He would have distributed over a ten-year period 43,865,385 shares to du Pont stockholders other than Christiana, Delaware and the stockholders of Delaware. He would have sold over the same period for the account of these latter corporations 19,018,997 shares, and for the account of the stockholders of Delaware 651,118 shares, or a total of 19,670,115 shares. See du Pont Exh. 51, R. 3057; Chr. Exh. 4, p. 3, R. 3076.

Pont stockholders of the shares of General Motors that they received in the annual distributions to realize cash with which to pay the income taxes due. The depressing market effect of both of these types of sales would in turn have led to additional sales by those holders of the remaining 218,000,000 General Motors shares who would have been disinclined to retain a stock that was to be depressed in price well below its true market value for a decade. Again, the finding of the court below after an extensive review of the evidence that was adduced on these matters (R. 3212-3234) was that the combined selling would have had a very serious depressing effect (R. 3247).

Even one of the annual sales by the trustee, approximating more than $80,000,000 (assuming a price for General Motors of something above $40 per share), would have been a major financial undertaking. Since 1936, there have been only ten rights offerings of industrial common stocks in excess of $80,000,000, and only four non-rights offerings of such stock in excess of $75,000,000. du Pont Exhs. 30, 32, R. 3035, 3038A.[46] An offering of $80,000,000 each year for ten years would have been a project unique in financial history. Lenz, R. 2066. See also Emerson, R. 1485, 1524-1525. Since an ample supply of General Motors stock is and has been freely available to investors who wish to buy it at the prevailing market price (R. 1518, 2108), the demand necessary to absorb each annual offering would have had to be created. That could have been done only by a decrease in the price below what it would have been had the 2,000,000 shares not been

[46] Two of these four non-rights offerings in excess of $75,000,000 are reflected in exhibits not printed. du Pont Exh. 63; App. Exh. 679.

added to the supply side of the supply-demand equation. The repetition of such offerings annually for ten years, moreover, would have produced a market impact considerably larger than the impact of any single offering. On this the witnesses who had had wide experience in the marketing of securities were emphatic (Emerson, R. 1508; Lenz, R. 2066-2067; Forgan, R. 2237-2238). Appellant's witnesses were inclined to agree (Friend, R. 1030, 1036; Boulton, R. 537-538). Moreover, the continuous pressure on the price of the stock would have led sophisticated purchasers to defer purchases until it reached a very low level. The fact that substantial amounts of General Motors stock would have been distributed to many institutional investors as dividends on their du Pont stock would also have tended to decrease the demand by such investors for General Motors stock, Herd, R. 1838-1839.

Moreover, the sales by the trustee would have been but one part of the annual increased offerings of General Motors stock. Many du Pont stockholders, upon receipt of General Motors stock in the annual distribution, would have found it necessary to dispose of it in order to obtain cash for taxes.[47] Although no precise estimate is possible, a conservative consensus of the witnesses who testified on this matter was that 1,000,000 shares of General Motors stock would have been offered for sale each year for these reasons.

[47] The pressure to sell would have been particularly strong in the case of large du Pont stockholders in the higher tax brackets whose income tax on the General Motors stock they would have received would have been roughly equivalent to their net income from all sources after federal income taxes. Such persons would have been likely to have sold the General Motors stock rather than other securities to obtain the tax money needed because it could have been sold without any capital gain. See Emerson, R. 1486-1491.

Emerson, R. 1486-1491; Jacoby, R. 1732-1734; Lenz, R. 2073-2074; Forgan, R. 2233-2234. These shares, though they would have been equal to only half of the annual sales by the trustee, would have been sold in a disorganized fashion, each seller acting on his own to try to get his money out of the General Motors shares as quickly as possible before the selling by other stockholders drove the price down. See Lenz, R. 2074-2075.[48]

Furthermore, it was likely that many General Motors stockholders would have undertaken to dispose of their holdings because of concern about the effect of appellant's judgment on the market value of the stock during the period of divestiture. Mr. Winthrop Lenz, an officer of the nation's largest brokerage firm, Merrill Lynch, Pierce, Fenner and Smith, testified that the likelihood of such sales posed perhaps the most difficult problem raised by appellant's proposal. Even had only two per cent of the 218,000,000 General Motors shares held by stockholders other than du Pont and Christiana been offered for sale each year, the number of shares so offered would have exceeded the total annual sales by the trustee and the du Pont stockholder distributees combined (R. 2076-2077). In view of the testimony by Mr. Lenz that entry of the judgment proposed by appellant would have led his firm in the exercise of its business judgment to remove General Motors stock from its "preferred for purchase" list, which is distributed regularly to some 425,000 investors, it is probable that well above two per cent of these General Motors shares would have been offered for sale (R. 2080-2081).

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[48] Since each stockholder would have been taxed on the price of the General Motors stock on the date of distribution, many would have sold immediately in order to realize the amount on which they would have to pay taxes and to avoid the risk of any decline in that price. Lenz, R. 2075.

B. DIVESTITURE ON THE TERMS NOW PROPOSED BY APPELLANT WOULD CAUSE THE SAME SERIOUS CONSEQUENCES AS THE PLAN REJECTED BY THE DISTRICT COURT

Appellant's proposal to the District Court would have required a distribution of the 63,000,000 shares of General Motors stock as a dividend over a ten-year period, and a sale during that same period of approximately one-third of those shares. Its present proposal would order "du Pont to divest its entire holding ratably over a stated period, i.e., ten years" (Br. p. 28) but would empower du Pont "to choose what methods of disposition it will employ and the extent to which it will utilize particular methods" (Br. p. 65). The Court should not be misled, however, by the appearance of flexibility in this proposal. It remains in its essentials just what the District Court rejected—sales and distributions over a ten-year period.

Before turning to a discussion of the methods of divestiture to which appellant now "calls attention" (Br. p. 66) in arguing the feasibility of its present proposal, a few words of background will be helpful. Since June 1957, when this Court ordered further hearings on relief, considerable time, effort and energy have been expended in seeking solutions for the practical problems involved in framing a final judgment. There was considerable public interest in these problems, as appears from the first report of *Amicus* Dallstream (not printed), and many suggestions were volunteered. Among other things, appellant, the appellees, the *amici curiae*, and the District Court considered exhaustively whether there was a method or a combination of methods by which divestiture of the legal title could be accomplished without serious injury to individual stockholders who are wholly innocent of any violation of law.

Appellant would have it appear that the District Court limited its consideration of possible methods of divestiture of legal title to appellant's original proposal (Br. p. 59). On the contrary, the court noted that it had "considered whether there might be modification of the Government's plan or other forms of divestiture of the legal title which might reduce or mitigate these adverse consequences" (R. 3248). Although appellant itself finally elected to stand on its original proposal,[49] the record before the District Court contains evidence on a number of alternatives. The possibilities of mitigating the disruptive market consequences of appellant's proposal by extending the period within which it would be carried out to 20 years rather than ten or, alternatively, by doing it in one year, and the possibilities of distributing the stock in lieu of some or all of du Pont's cash dividends were all examined by the experts who testified. See Emerson, R. 1537-1538, 1542-1543, 1545-1546, 1610-1611; Lenz, R. 2084-2086; Jacoby, R. 1719, 1739; Lowell, R. 1941-1944, 1949-1951; Caley, R. 1806-1808; Moses, R. 2010-2011. No method of divestiture of legal title was found that held any promise of accomplishment without serious consequences to the many stockholders concerned. The District Court expressed its own belief that no such method existed (R. 3249). Nevertheless, although abandoning the plan on which it stood so firmly in the District Court and although

[49] Counsel for du Pont suggested near the close of the presentation of its evidence that appellant should make clear what form of judgment it was proposing in order to be sure that the evidence was responsive to all possible suggestions (R. 2290-2291). At the end of the ensuing colloquy the court stated (R. 2292): "It is my understanding then that you are standing on the decree that you proposed before this hearing started." Chief trial counsel for appellant replied: "That is right, sir." See also R. 3192.

avoiding the formulation of a substitute plan, appellant assures this Court that du Pont can accomplish the divestiture without undue hardship.

We suggest that in the face of the compelling evidence of record, much of which was introduced by appellant itself, appellant is hardly entitled to take refuge in the general and vague proposals it now advances. Its efforts now to improvise a palatable proposal for divestiture of the legal title cannot surmount the two fundamental difficulties on which its earlier proposal foundered: (1) the magnitude of the financial problems and the variety of inherently conflicting individual interests, and (2) the fact that "the single, basic command" of divestiture, as appellant so simply puts it, is in and of itself the factor that would set in motion the forces that would inevitably cause serious tax and market consequences.

Once this "basic command" was given, du Pont would be under a court order to dispose in some way or ways of legal title to 63,000,000 shares of General Motors stock having a current market value in excess of $2,500,000,000; it would be under a court order to complete the disposition within a "stated period, i.e., ten years"; and it would be required to divest "ratably" over that period (App. Br. p. 28). The very entry of such an order, as the record shows, would produce a serious depression of the market values of both du Pont and General Motors stock. A vast increase in the supply of General Motors stock would be inevitable, and General Motors stock immediately would sell for less. How much less is a matter on which opinions may differ, but it is beyond controversy that the prospect of a greatly increased supply of stock for sale would depress the market price. For related reasons

the value of du Pont stock would be depressed. It would be common knowledge that assets underlying approximately one-third of the company's earnings would have to be disposed of under circumstances that would make it impossible to realize their fair value and that would give rise to substantial taxes. Perhaps the most graphic description of the effect of a "basic command" was that offered by appellant's witness Mr. Schroeder Boulton. In explaining to counsel for appellant why a substantial increase in the volume of General Motors stock coming on the market would have more than a short term effect on price, Mr. Boulton said (R. 539):

> "* * * every sophisticated buyer would know that more was yet to come."

This effect is not solely a matter of the multi-billion dollar value of the shares to be divested. The depressing market effects would stem from the combination of this fact with the fact that divestiture would be mandatory; it would not be grounded upon market and general business conditions but upon the order of the court. The significance of this factor can be illustrated by a contrast with the sales by the Ford Foundation of Ford Motor Company stock in 1956 and again on two occasions in 1959 (App. Br. pp. 76-77). Appellant likens to the divestiture order it asks of this Court a statement by the Foundation that it might sell additional shares. In fact, there is no similarity whatever. The economic interests of the Ford Foundation require that it do nothing to depress market values of Ford stock. It need never sell another share unless it chooses to do so. It has an unlimited period of time in which to act. Every investor knew that any stock to be sold by the Foundation would be put

on the market only in circumstances that suited the needs and convenience of the Foundation. The order which appellant would impose on du Pont supplies no such safeguards; it would simply command "divest within a stated period at a stated rate." The difference is the difference between freedom and compulsion. No amount of window dressing can obscure this; knowledgeable buyers in the market place would not be blind to realities.

Appellant advances three methods by which it says divestiture of legal title can be accomplished without "undue hardship" to stockholders: (1) exchange offers, (2) distributions, and (3) direct sales. As we propose to show, appellant has added only insignificant and impracticable frills to its proposal below. If the single basic command to divest ratably over ten years were to be carried out, the great bulk of the General Motors stock would have to be either distributed as dividends or sold, with the consequences already described in connection with appellant's District Court proposal.

1. Offers by du Pont to exchange General Motors stock for du Pont stock

The only method of divestiture of legal title to the General Motors stock that was not incorporated in appellant's now-abandoned proposal is the exchange of General Motors stock for du Pont stock, preferred and common. If this method were the panacea that appellant's superficial explanation of it suggests, one may properly wonder why appellant did not submit it to the District Court.[50] That court, which was charged

[50] The possibility of disposing of General Motors stock by exchanging it for du Pont stock was studied by appellee du Pont in the course of the formulation of the plan which it presented to the District Court. The study disclosed that exchange offers would not be a feasible method of disposition for the reasons hereafter stated.

with the responsibility for the formulation of the decree, had the facilities and the time to have assembled the evidence on which to form a judgment as to the feasibility and appropriateness of such exchanges, to have submitted that evidence to the test of cross-examination and analysis, and to have arrived at an informed judgment. This Court has had occasion to observe in connection with attempts to modify a district court antitrust decree that "the factual basis of the claim for modification should appear in evidentiary form before the District Court rather than in the argumentative form in which it appears before us." *International Salt Co.* v. *United States,* 332 U.S. 392, 401.

In view of the inadequacy of the one-page explanation vouchsafed by appellant of the "obvious availability" of this method (Br. pp. 66-67), we shall set out some of the problems that would arise in attempting to divest any significant number of shares of General Motors stock through exchange offers to du Pont shareholders. This discussion does not purport to be, and indeed could not be, definitive since the financial data and other facts upon which definitive analysis would depend are not available and many tax questions are unanswered.[51] It does, however, show that exchange

[51] The principal provisions of the Internal Revenue Code of 1954 which are applicable in determining the tax consequences of exchange offers are Sections 301, 302, 311(a), 316(a), 317 and 318; see also Treasury Regulations, 1.302-1,-2,-3,-4; 1.311-1(a), (e); 1.316-1(a), (c); 1.318-1,-2,-3. The applicable statutory provisions alone consist of several pages of closely printed text with numerous involved subdivisions and subparagraphs; the pertinent regulations consist of many more pages. All statutory section references in this discussion are to the Internal Revenue Code of 1954, U.S.C. Title 26

offers do not, as a practical matter, constitute a feasible method of disposing of any substantial percentage of the General Motors stock now held by du Pont.

It will be convenient to deal separately with the two types of exchanges that are suggested—for du Pont preferred, and for du Pont common.

a. Exchange of General Motors stock for du Pont preferred

Appellant asserts that if such exchanges could be accomplished they would not involve the imposition of any tax on du Pont itself. Although it is not clear that this assertion is correct we shall accept it for the purposes of this discussion.[52] Even so there is no assurance that even a single share of General Motors stock could be divested by such exchanges.

Du Pont has preferred stock outstanding with a stated value of approximately $240,000,000 (App. Exh. 692, R. 3020). It is redeemable, but only for cash, and not for General Motors stock, as appellant appears to assume. Hence the acceptance of any exchange offer would be a matter of choice with each preferred shareholder. How many would accept any particular offer is something no one could predict with any certainty. Although the record is barren of evidence as to the identity of the preferred stockholders, many of them are undoubtedly institutions or fiduciaries who are barred from holding common stock, and would be legally unable to accept any exchange offer. Moreover, preferred stock has an investment character and

[52] The governing Code provisions on tax to du Pont are Sections 311(a) and 317(a). The regulations interpreting these sections provide that if a corporation receives its own stock as consideration upon the sale of property by it, the provisions of Section 311 will not apply with the result that the exchanging company could be regarded as having realized gain. Regulations, 1.311-1(e)(1).

purpose quite different from common stock, and it is open to serious doubt whether a substantial number of the holders of du Pont preferred would be interested in, even if not legally disqualified from, exchanging it for General Motors common. Since, as appellant points out, the preferred stock moves in a relatively narrow price range so that any capital gain by a shareholder would be likely to be small, these shareholders have always been free to switch to General Motors common at a low tax cost.[53] The fact that they have not done so in itself indicates a preference on their part for an investment in preferred. It is appropriate to add that even if *every* share of the preferred stock were to be exchanged, it would effect a disposition of only some 6,000,000 of the 63,000,000 shares of General Motors.

Appellant asserts (Br. p. 67) that there "would seem little limit" on the number of General Motors shares that might be divested through exchange "provided du Pont chooses to make reasonably favorable offers." Stated somewhat less euphemistically, the suggestion is that du Pont should encourage the proposed exchange by giving to the exchanging shareholders some portion of the General Motors shares that equitably belong to non-exchanging shareholders. Since the preferred stock carries a fixed call price, it would be illegal under Delaware law to offer an exchange of

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[53] Although many preferred shareholders could probably exchange at the same relatively small tax cost, it should be noted that any such shareholder who also owned du Pont common would face dividend treatment on the entire value of any General Motors stock received by him in exchange for preferred unless he were able to meet the stringent conditions discussed below in connection with the exchange of General Motors stock for du Pont common. See Section 302(b)(2)(C).

General Motors shares whose market value was more than the call price.[54] And even apart from this problem, a method of divestiture that required the management of a corporation to assume responsibility for redeeming its own preferred at a price well above the market in the absence of a normal business justification would amount to a forced donation to one class of stockholders of the property of other stockholders and could hardly appeal to the conscience of a court of equity.

b. Exchange of General Motors stock for du Pont common

Since there is only a relatively limited amount of du Pont preferred stock outstanding, it is apparent that the real basis of appellant's exchange suggestion is that the General Motors stock be exchanged for du Pont common stock. Yet it is this suggestion that is the more misinformed and misleading. Appellant's theory is that such an exchange could be effected without tax to du Pont, and with only a capital gains tax to the exchanging shareholder measured by the difference between the basis for his exchanged du Pont stock and the value of the General Motors stock received in the exchange. As a practical matter, such an exchange on the scale proposed by appellant is utterly impracticable.

The tax complexities are enormous. As noted above, appellant's assertion that such an exchange could be made without tax to du Pont is open to doubt. Moreover, any General Motors stock exchanged for du Pont common stock would be treated as a dividend to the du Pont stockholders and subjected to tax at ordinary

[54] Delaware Code Annotated (1953) Title 8, Sec. 243(a)(2).

income tax rates—just as a distribution would[55]—unless the requirements of one of three provisions of the Internal Revenue Code were met:

(1) *Section 302(b)(1).* This section permits capital gains treatment for an exchange if the distribution of General Motors stock in the exchange is not essentially equivalent to a dividend under the tax law. The chances of an exchange of General Motors stock for du Pont stock being so regarded by the Internal Revenue Service can be conservatively stated as nil. Since the Internal Revenue Service has already held that the distribution of General Motors stock to du Pont shareholders would be a dividend, it can hardly be doubted that the Service would take the position that a redemption to accomplish substantially the same purpose would be essentially equivalent to a dividend.[56] Appellant could have ascertained the position that the Internal Revenue Service would take in this respect, and certainly should have done so, before advancing exchange offers as a means of divestiture.

(2) *Section 302(b)(2).* Under this provision an exchange can qualify for capital gains treatment if it is substantially disproportionate with respect to the individual shareholder making the exchange. For a du Pont shareholder to be able to take advantage of

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[55] Sections 301(a), (c); 302(d); 316(a); 317(b).

[56] Indeed, the Service has been so reluctant to rule in advance that any proposed redemption is not essentially equivalent to a dividend that there is a widely-held belief among tax experts that the Service has decided that Section 302(b)(1) has no independent vitality, despite the apparent intent of Congress. See, *e.g.*, Young, *Extreme Care Needed Today To Avoid Dividend Treatment of Stock Redemptions*, 7 J. of Taxation 66 (1957); Wolfman, *Some of the Attribution-of-Ownership Problems Involved in the Redemption of Stock*, 33 Taxes 382, 384-385 (1955); Regulations, 1.302-2(a), (b).

this section his proportionate ownership of du Pont stock after the exchange would have to be less than 80 percent of his proportionate ownership of that stock before the exchange. In determining "ownership", Section 318 attributes to each individual shareholder all stock owned directly or indirectly by his spouse, children, parents, or grandchildren and proportionate parts of stock owned by partnerships, trusts and estates in which he or they have an interest, as well as proportionate parts of stock owned by any corporation controlled by him or by any other of the foregoing persons or entities.[57] Moreover, it is important to recognize that the tax treatment accorded each du Pont shareholder would depend on the amount of stock surrendered for exchange by every du Pont shareholder; if all surrendered the same percentage no single stockholder could meet the "substantially disproportionate" test. Therefore, until the exchange was completed, no shareholder could be sure that he had not, for tax purposes, received a dividend measured by the entire value of the General Motors shares he had received which would be taxable at ordinary income rates.[58] Finally, the exchange would not be "completed" when one exchange was made; all transactions

[57] Stock owned directly or indirectly by any partners of the partnerships or beneficiaries of the trusts and estates would also be attributable. Section 318(a)(4)(A).

The complexities of the attribution rules of Section 318 are extensively discussed in Ringel, Surrey, Warren, *Attribution of Stock Ownership in the Internal Revenue Code*, 72 Harv. L. Rev. 209 (1958).

[58] If a shareholder desiring to meet the 80 percent test sought to avoid this problem by attempting to surrender substantially more than 20 percent of his du Pont shares, he might well find, because of the attribution rules mentioned above, that he did not have control of a sufficiently large percentage of the shares attributed to him to utilize this course.

arising out of du Pont's compliance with the order of divestiture would be taken into account in determining whether any given du Pont shareholder met the "substantially disproportionate" test. If, for example, an exchange or other redemption taking place five years after a shareholder had made an exchange were to increase the shareholder's *pro rata* share of du Pont common stock so that he no longer met the "substantially disproportionate" test, he would be charged retroactively with having received a dividend. See Section 302(b)(2)(D), and Regulations, 1.302-3(a).

(3) *Section 302(b)(3).* Under this section an exchanging stockholder would avoid having the General Motors shares distributed to him treated as a dividend if, but only if, he terminated his entire interest in any du Pont stock (common or preferred) at the time of the exchange. The attribution of ownership rules set out above are likewise in large part applicable here. Accordingly, a stockholder could be protected against dividend treatment of the General Motors stock that he received only if he could be sure that not only all of his du Pont stock was exchanged for General Motors stock, but also all of the du Pont stock owned by any partnership, trust or estate in which he had an interest, by any partner of such partnership or beneficiary of such trust or estate, and by any corporation which he or any of them controlled.[59]

[59] In addition, if a shareholder sought to terminate his interest in du Pont within the meaning of this section, he would have to arrange for disposition of all stock that might be attributed to him under the family attribution rules unless he agreed not to acquire any interest in du Pont (except as a creditor) other than by bequest or inheritance for ten years thereafter. Section 302(c)(2). No officer, director or employee of du Pont could avoid the family attribution rules unless he gave up his position as officer, director or employee for ten years.

Even for those shareholders who could successfully thread their way through the maze of Section 302, the capital gains tax, imposed at a rate of 25 percent (or one-half of the shareholder's top tax bracket if that is less), would still be substantial. In determining whether to accept an exchange offer, each shareholder would have to subtract from the value of General Motors stock to be received the amount of tax he would have to pay. Since it is probable that less than 10 percent of the du Pont common stock is held by persons whose basis is at or above the present market price, any offer that would attract a significant number of du Pont shareholders would have to include an additional premium (above that necessary to make an exchange otherwise attractive) to compensate for the tax liability. For an exchange program to account for any appreciable part of the General Motors stock, this additional premium would have to be very substantial. But, as has been discussed above, the fiduciary duty of the management to non-exchanging shareholders would limit the degree to which it could thus donate property equitably belonging to all the stockholders to a particular group of stockholders. In such circumstances it is most unlikely that any plan of exchange would be effective in practice even as to shareholders who met one of the tests of Section 302.

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Appellant seems to believe that tax-exempt organizations owning either preferred or common stock of du Pont would be unable to resist an exchange offer because it could be accepted without tax consequences. What appellant overlooks is that such organizations would have no incentive to exchange. Because they are tax exempt, they have always been in a position to

sell their du Pont stock and invest the proceeds in General Motors stock. Any tax-exempt organization that would prefer $100,000 worth of General Motors common to its present holdings of du Pont of equal value can have it. Again, what appellant seems to mean is that an exchange can be effected by offering such organizations a number of General Motors shares whose market value is substantially in excess of the market value of the shares of du Pont to be exchanged. In other words, the "reasonably favorable offers" to which appellant refers (Br. p. 67), would in this instance necessarily require the management of du Pont to take the responsibility for turning over to a group of tax-exempt stockholders assets that properly belong to the stockholders as a whole.

The fact that du Pont would be compelled to offer an exchange ratio for both its common and its preferred substantially more attractive than that theretofore obtaining on the open market in order to have any chance of attracting a significant number of exchanges would also necessarily result in a decrease in the market price of General Motors stock, with consequent injury to General Motors shareholders, since persons desiring to own General Motors stock could, because of du Pont's offer of a premium, do so cheaply by purchasing du Pont shares in the market and exchanging them. These market consequences would be intensified by the fact that exchanging shareholders would for the most part incur a substantial tax liability and therefore many of them would be forced to sell a portion of the General Motors stock received in the exchange in order to obtain cash with which to pay their taxes. Further, some shareholders would undoubtedly participate in the exchange only to take advantage of the

substantial premium which would have to be offered and would immediately sell their General Motors stock before the price was further eroded by market pressure, thereby increasing the downward pressure on the price of General Motors stock.

In summary, appellant in asking this Court to order du Pont to divest itself of legal title to General Motors stock cannot give the Court any assurance that any significant amount of that stock can be divested through exchange offers. At best the prospects would be altogether speculative. They would depend upon the investment requirements and preferences of many thousands of persons and upon determinations by the Internal Revenue Service that could not be predicted in advance. Du Pont, although under a mandatory order to divest, would have to rely upon a method of divestiture whose efficacy would depend upon governmental tax determinations and upon independent choices made by persons over whom du Pont has no control, and its management would be required to take the responsibility for decisions fixing exchange bases that would subject it to criticism and litigation.

Accordingly, if du Pont were to be compelled to accomplish divestiture of the legal title in accordance with appellant's demands, it would be required to accomplish it almost entirely through distribution, or sale, or through a combination of both. To these two means of divestiture, which have from the start been the foundation of all of appellant's proposals, we now turn.

2. Sales by du Pont of General Motors stock

Appellant's abandoned proposal to the District Court did not contemplate sales of General Motors stock by du Pont. The trustee, however, was to have been re-

quired to sell on behalf of certain stockholders some 2,000,000 shares of General Motors stock each year for ten years. As we have already stated (pp. 66-68, *supra*), the evidence showed, and the court found, that sales of this magnitude would have a substantially depressing effect on the market price of General Motors stock. Nonetheless appellant holds out sales as one of the methods "obviously available" to accomplish divestiture of the legal title without hardship to du Pont and General Motors stockholders (Br. pp. 66, 72-73), although it suggests no reason why sales by du Pont would be any less disruptive of the market than the sales by the trustee would have been.[60]

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[60] Appellant asserts: "To the extent that du Pont utilizes sale to the public as a means of divestment, it will control the timing and method of sale and there is every indication that sales so controlled and managed will not disrupt market price or involve sacrifice of value" (Br. p. 28). This assertion is incorrect. Under appellant's proposal du Pont could not control the timing of sales. It would be compelled to dispose of a fixed number of shares each year by sale or otherwise and to complete the entire divestiture within a ten-year period, and only a part of the stock required to be divested in each year could be disposed of by methods other than sale. Appellant itself appears to recognize this fact (as, for example, by suggesting that du Pont distribute 1,150,000 shares annually as dividends). The effect of appellant's proposal therefore would be to compel du Pont to sell a substantial number of shares each year within the ten-year period without regard to market conditions. And any dispositions deferred by permission of the court would serve to accentuate the problems of disposition in the remaining part of the ten-year period. Nor is it true, as appellant asserts, that "sales so controlled and managed" will not depress market prices. Although a seller who enjoys this kind of control is in a far more advantageous position than du Pont would be under appellant's proposal, there is ample evidence in the record that even if the seller is under no compulsion whatsoever to sell and is completely free to select the time and method of sale, sales

In fact, sales by du Pont would probably have to be greater in amount than the sales by the trustee would have been. If du Pont were to attempt to sell its entire holdings of General Motors stock in execution of the plan for divestiture of legal title urged by appellant, it would be required to sell 6,300,000 shares each year for the next ten years. This would be three times the volume of annual offerings by the trustee which the witnesses testified would have substantially depressed the market value of General Motors stock (R. 1508, 1605-1606, 1822, 2040-2041, 2066-2067). Even if du Pont were to sell 3,000,000 shares annually, which is the figure appellant now suggests (Br. p. 71), and to dispose of the balance by other means, such as distribution, the disruption of the market would be at least as great as that which was found by the court below. Accordingly, the same evidence and line of reasoning that persuaded the District Court to reject the judgment that was initially proposed by appellant require rejection of its substitute proposal.

Appellant's present position ignores the evidence that supports the findings it refuses to challenge. There is no basis in the record for appellant's assertion that "it is clear on the evidence" that du Pont can divest its General Motors stock by means of sale

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of stock in the volume that would be required by appellant's proposals do depress the market price (see pp. 88-91, *infra*).

The effect of a compulsory order of divestiture on the market value of General Motors stock could not be mitigated by provisions for future amendment or revision as suggested by appellant (Br. pp. 65-66). The market would necessarily and properly appraise the effect of the order on the assumption that divestiture was to be completely accomplished within the specific period of time fixed in the order and in the ratable annual amounts specified in the order.

"without appreciable or significant effect on the market price of General Motors stock" (Br. pp. 72-73). The several possibilities for placing large amounts of General Motors stock to which appellant adverts (Br. pp. 72-78) were, without exception, carefully considered by the experts who testified and by the District Court. None of these possibilities, and no combination of them, was found to make feasible the forced sales contemplated by appellant's now-abandoned plan. Much less can they justify the even larger sales that would be necessary under appellant's present proposal. For example, the District Court took into consideration the fact that General Motors in some years has purchased approximately 1,000,000 shares of its own stock on the open market for use in its Bonus Plan, and issued about the same number of new shares in connection with its Savings Stock Purchase Program (R. 3215-3216). General Motors' purchases on the open market are a part of the normal demand for General Motors stock; to divert those purchases as appellant suggests would decrease that demand and necessarily depress the price of the stock (R. 2218, 2257). And issuance of new shares by General Motors is a means by which it raises new equity capital; there is no legal basis for denying it that privilege (R. 876-877; App. Exh. 177, p. 2 (not printed)).

Appellant has also indulged in the practice of presenting only selected portions of the evidence that was considered by the District Court. An example is its treatment (Br. p. 63) of the divestiture ordered in *United States* v. *Aluminum Co. of America*, 91 F. Supp. 333 (S.D.N.Y. 1950). Appellant nowhere mentions that the dollar value of all the Aluminium stock which has been sold under that court order is

$150,000,000 (App. Exh. 443, R. 2846A), or only 6 percent of the value of du Pont's General Motors stock.[61] The judgment in the *Aluminum* case fixed a period of ten years within which the divestiture was to be accomplished. Nine years after the entry of that judgment some of the Aluminium stock remained to be disposed of (App. Exh. 438, 439, R. 2842-2844). If the experience under the *Aluminum* judgment is to be regarded as a precedent, and sales of the General Motors stock are to take place at a comparable dollar rate, almost a century and a half would be required to complete the process.

Appellant implies that the market performance of Aluminium stock was not adversely affected by those sales, citing Standard & Poor's price index for industrial stocks. These sales were carefully scrutinized by several of the witnesses before the District Court, and appellant has simply failed to advert to the uncontroverted evidence that at least in part because of the compulsory sales, the price of Aluminium stock throughout the period of these sales was very substantially depressed in comparison with the stock of every other aluminum company (du Pont Exh. 47, R. 3052B; see Emerson, R. 1504-1506; Lenz, R. 2068-2070; Friend, R. 1041-1042).

Appellant refers to the secondary offerings of common stock in the Ford Motor Company and The Great Atlantic & Pacific Tea Company (Br. pp. 76-77). Ap-

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[61] Appellant's statement (Br. p. 63 n.) that there were 7,727,850 shares of Aluminium stock to be divested is misleading. The order of the District Court applied to 1,287,975 shares of Aluminium stock (App. Exh. 438, R. 2842-2843). Appellant's higher figure is obtained by multiplying this figure by the splits of Aluminium stock, totalling 6 for 1, which occurred after the divestiture was ordered, and after some of the sales had taken place.

pellant does not, however, advert to evidence which shows that the success of the Ford offerings was in large part a result of the fact that before 1956 no stock in this large and famous American corporation had ever been offered to the public for investment (in contrast, approximately 218,000,000 shares of common stock of General Motors are now held by more than 700,000 stockholders other than du Pont); that the Ford Foundation, as we have pointed out above (pp. 74-75), was completely free to offer stock for sale as it chose; and that the difficulty and cost of making sales of large amounts of the stock substantially increased after the initial offering (R. 1502-1504, 2067-2068, 2565, 2570-2571).[62] In its discussion of the Atlantic & Pacific offering, appellant does not disclose that Dr. Friend, its own expert witness, admitted that this *single* offering was accompanied by a decline in the market price of between 10 and 15 percent (R. 2600-2605). Appellant's own proposal for divestiture contemplates sales as large or larger than the Atlantic & Pacific offering in each year during the proposed ten year period of disposition. A 10 to 15 percent impact on the market price of General Motors in each of these ten years cannot be dismissed as insignificant on the ground that it is merely "short range".

Appellant also relies (Br. pp. 77-78) upon the fact that American Telephone & Telegraph Company has made to its shareholders a number of offerings of convertible debentures and one offering of common stock through subscription rights.[63] It makes no reference,

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[62] The underwriting spread of the Ford offerings increased from $1.50 per share on the first offering to $2.00 per share on the second (R. 2565).

[63] Appellant also introduced at the hearing in the District Court extensive evidence relating to preferred stock and deben-

however, to the testimony which shows that because of the difference between these types of offerings and secondary offerings of common stock, the American Telephone & Telegraph experience has little relevance to the problems that would be created by secondary offerings of General Motors stock (R. 410-412, 1498, 2071), and does not disclose that Dr. Friend admitted that the American Telephone & Telegraph situation "is rather different" from the situation that would be caused by repeated secondary offerings of General Motors stock (R. 1051). See also Scanlon, R. 335-336; App. Exh. 1, R. 2640, 2641, 2642.[64]

All of the evidence with respect to sales of stock in large dollar volume that appellant elects to discuss establishes only one proposition (and one that has never been in issue): that large amounts of stock can be sold—at a price. It does not provide even moderate assurance that forced sales of the magnitude that would be required under a divestiture command could be accomplished without seriously depressing the market price of General Motors stock.[65]

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ture and bond offerings by industrial and utility corporations during recent years (*e.g.*, App. Exhs. 618-638, R. 2941-2961; 656, R. 2979; 55, 120 (not printed)). Appellant's own witnesses conceded that these transactions were so different from secondary offerings of common stock of an industrial corporation that they were of limited relevance in any effort to determine the probable impact of appellant's plan upon the market values of du Pont and General Motors stock. See Emerson, R. 476-477, 690; Scanlon, R. 335-338; Friend, R. 1000, 1051-1052.

[64] The Treasurer of American Telephone and Telegraph Company, called as a witness by appellant, testified that the repeated offerings by the company had had a depressing effect on the market price of the company's stock. Scanlon, R. 338-339.

[65] Appellant's discussion of secondary offerings at pp. 75-78 of its brief is marked by a singular reluctance to discuss the effect of these offerings on price. Instead appellant emphasizes the fact that the stock offerings were "sold within twenty-four hours"

Appellant's proposal that the General Motors stock be sold by du Pont also ignores the fact that the tax impact of these sales would have a substantial adverse impact upon the equity of the stockholders of du Pont. If all the General Motors stock were to be sold, the capital gains tax would be approximately $630,000,000, or about $10 for each share sold, at current market prices for General Motors stock. On appellant's assumption that half of the stock would be sold, the equity of the stockholders of du Pont would be impaired in the amount of $315,000,000 (App. Br. p. 71). Appellant attempts to justify this impairment of the stockholders' equity (Br. pp. 71-72) by reference to the dividends that they have received, and the amount by which General Motors stock has increased in value since du Pont first acquired it. Were the Court concerned with penalties, and with the quantum of punishment that it should mete out, these matters might be relevant. But the fact that some stockholders have profited from an investment made by du Pont more than 40 years ago provides no warrant for impairing the equity of all the stockholders by several hundreds of millions of dollars.[66]

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or were "heavily oversubscribed" or sold "within five minutes". No reference is made to the evidence that shows that these offerings were preceded by months of sales effort (see, *e.g.*, R. 592-593, 618-619, 2564; du Pont Exhs. 64, 74 (not printed)) and no recognition is given to the fact that a short lapse of time between the effective date of the secondary offering and the time when the stock is sold proves nothing as to the effect of the offering on the market price of the security.

[66] The great majority of du Pont's present stockholders have not, of course, profited by du Pont's investment in General Motors by anything approaching their *pro rata* portion of the appreciation in that investment since it was first made. Stockholders who bought du Pont stock after the investment was made paid a price that reflected the appreciation of the value of the General Motors stock that had taken place before the time of their purchase.

3. Distribution of General Motors stock as dividends

The third of appellant's "obvious" methods of divestiture of legal title to the General Motors stock—distribution to du Pont stockholders—was the core of appellant's now-abandoned proposal. What it would mean in terms of a tax burden upon the 300,000 beneficial owners of du Pont stock has been described above (pp. 59-63, *supra*). Distribution of a capital asset which du Pont has held for more than 40 years would be taxed as if it were a distribution of ordinary income.[67] Appellant is aware of this, and aware, too, of the uncontradicted evidence in the record that any significant distribution of General Motors stock would cause a substantial volume of disorganized selling that would have a serious impact on the market value of General Motors stock (see pp. 69-70, *supra*).[68]

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[67] The fortuitous character of the tax liability is illustrated by the fact that the distribution would be taxed as a dividend not because the General Motors shares had appreciated in value while held by du Pont, but solely because of the fact that as of the divestiture date du Pont would have had accumulated earnings and profits from its chemical operations (Dallstream Exh. 2, R. 3154, 3178). In the same vein it should be observed that if du Pont owned 80 percent of the General Motors stock—even though the stock had a value substantially less than that of its present holdings—it could distribute the stock to its shareholders without the imposition of any tax. See Internal Revenue Code of 1954, Secs. 355, 368(c); testimony of the Assistant to the Secretary, Treasury Department, in Hearings before the Senate Committee on Finance on S. 200, 86th Cong., 1st Sess. (1959), p. 20.

[68] The record contains evidence showing the effect of the forced distribution of RCA stock made by Westinghouse and General Electric pursuant to an antitrust consent judgment in 1933, when tax rates were very much lower than they are today. When that distribution took place the volume of sales of RCA stock on the New York Stock Exchange increased from about one percent to about three to three and a half percent of the total sales on the Exchange. The price of RCA stock declined sharply between the date of the

Appellant makes no direct response to these uncontroverted facts. Rather, it seeks to avoid them, in several ways. It asserts, for example, that du Pont could mitigate the tax burdens on the du Pont stockholders by paying only its regular dividend, but paying it partly in General Motors stock (Br. pp. 67-70). The difficulty with that assertion is that the proposal has already been explored and found wanting. Appellant urged the same proposal on the District Court in connection with the distribution which was contemplated by the plan it then espoused; it was considered by several witnesses; and it was rejected by the District Court (R. 3247-3248).[69] Appellant suggests that if du Pont

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signing of the consent decree and the date on which distribution was made, and for a time thereafter the price continued to be depressed in relation to the general performance of the market as shown by the Dow-Jones Industrial Average. du Pont Exhs. 27-29A; R. 3031-3034; see Emerson, R. 1494-1495.

[69] The District Court found that the distribution of General Motors stock in lieu of cash dividends not only would intensify the adverse impact of appellant's plan on the market value of General Motors stock, but would result in the accumulation of cash by du Pont in excess of its normal needs in the amount of $2,500,000,000 to $3,000,000,000. The court expressed its unwillingness to use its equitable powers "in a way that seems certain to enhance the power and position of the du Pont Company and perhaps create new antitrust problems * * *" (R. 3248). Appellant suggests that it would be "sound corporate practice" for du Pont to use some part of this cash to purchase its own common stock, thereby creating additional demand which would "offset such additional supply as resulted from selling by stockholders" (Br. p. 70). Whether it would be "sound corporate practice" for du Pont to spend $2,000,000,000 or more to support the market for its own stock is open to serious question (compare appellant's statement that support of the market price of its own stock is not "a proper function of General Motors" (Br. p. 74)); and such conduct might raise difficult questions under federal securities legislation and the applicable

would thus distribute to its shareholders 1,150,000 shares of General Motors stock per year this could be done without imposing any additional tax on the stockholders (Br. p. 68). If we assume that this is to be the rate at which appellant would expect du Pont to divest by distribution to the du Pont stockholders, only 11,500,000 shares would be disposed of in this way during appellant's proposed ten-year period, and some 51,500,000 shares would remain to be disposed of by sale—more than 5,000,000 shares per year. If, in the interest of minimizing the disastrous market impact that would be caused by the forced sale of this amount of shares, du Pont should attempt to divest one half of its holdings by distribution to its shareholders, this distribution, if made at the rate suggested by appellant, would require approximately 27 years.[70]

Securities and Exchange Commission regulations. In any event, appellant apparently recognizes that it would not be feasible for a court to compel du Pont to engage in this kind of a market operation and does not suggest that any court should do so. Thus the use to be made of the accumulated cash would be a matter within the discretion of the du Pont management: Since it would also be "sound corporate practice" for du Pont to use this cash in commercial operations, the force of the District Court's observation is not diminished by appellant's suggestion.

[70] Appellant refers to a few instances in which companies have distributed as dividends the stock of other companies (Br. pp. 69-70). In all of these instances the value of the stock distributed was so small in comparison with the value of the stock that would have to be distributed under appellant's proposal that the instances provide no support for the argument that a distribution could be made in accordance with that proposal without an undue tax burden on the du Pont shareholders and without a substantial depressing effect on the market price of General Motors stock. For example, appellant refers to the dividend distributions made by Standard Oil Company of Indiana in stock of Standard Oil Company (New Jersey). But if du Pont were to distribute ap-

Appellant's entire discussion of distribution as a method of divestiture makes it apparent that its real position as to the tax consequences of a distribution is that they should be ignored. Appellant would blindfold a court of equity to the tax consequences that its order would visit upon hundreds of thousands of individuals. "The impact of federal taxes," appellant asserts, "is not a pertinent factor in ordering relief in an antitrust proceeding" (Br. p. 59). It is difficult to believe that appellant urges this position seriously. In framing their decrees courts should act with full awareness of all the factors and circumstances that will be affected by their orders. In view of appellant's insistence upon complete divestiture, we can understand why it prefers to ignore tax consequences. There is no logic or authority that would justify a similar attitude by a court of equity.

It is only in this Court that appellant has become persuaded that the impact of federal taxes is irrelevant. In September 1957, when appellant was still formulating the judgment that it proposed below, Assistant Attorney General Hansen wrote to a du Pont stockholder assuring him that the Antitrust Division

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proximately the same percentage of its dividend in General Motors stock as the Indiana company distributed in stock of the New Jersey company, distribution of the entire amount of General Motors stock would require approximately 30 years, assuming its present market value (du Pont Exh. 39, R. 3046A). If the distributions were made by du Pont in approximately the same annual dollar amounts that were involved in the distributions by Standard Oil of Indiana, distribution of the General Motors stock would take approximately 130 years (du Pont Exh. 66, R. 3068A).

Appellant also refers (Br. pp. 63-64) to the distributions that took place as a consequence of corporate reorganizations pursuant to the Public Utility Holding Company Act, but without attaching any significance to the fact that the stockholders there involved were not taxed on the shares distributed to them.

was giving careful study to the effects that any judgment would have on the du Pont and General Motors stockholders, "including the tax effect" (R. 1453-1454).[71] The necessary implication of appellant's present position is that tax consequences are a proper concern in drafting a plan, but are no concern of a court in passing upon it.

Moreover, appellant was not persuaded of the irrelevance of taxes at the hearing below. Appellant presented as an expert witness an accountant and lawyer (R. 2433) who had been retained "to assist the Department of Justice in devising ways and means of minimizing the impact of the income tax upon the du Pont stockholders" (R. 2465).[72] Indeed, even in appellant's brief to this Court its proposal (Br. p. 68) that du Pont change its cash dividend policy in order to avoid additional taxes on du Pont stockholders is curious if taxes are "not a pertinent factor."

Appellant has also taken a different position in appearances before Congress. At the recent hearings

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[71] At the recent Congressional hearings referred to at pp. 98-100, *infra*, the Acting Assistant Attorney General in charge of the Antitrust Division stated in regard to this proceeding (Senate Hearings, p. 322):

> "Senator Williams. • • • In your statement, as I understand it, you said the Department of Justice was concerned with the tax liability that would be generated as a result of this decision.
>
> "Mr. Bicks. Well, we were certainly concerned about it and took it in mind in formulating our plan."

[72] Unfortunately, the only "ways and means" which the witness tendered admittedly raised serious problems under the tax laws and not only had not been approved by the Internal Revenue Service (R. 2459-2462, 2466, 2486), but were not even acceptable to the Department of Justice itself (R. 2466-2467). Appellant's briefs to the District Court and this Court understandably contain no reference to the testimony of this witness.

on proposals to amend the tax laws as they apply to distributions of stock made pursuant to antitrust judgments, the Deputy Attorney General advised the Senate that courts do consider tax consequences in deciding whether to avoid divestiture in antitrust cases, and that hence "appropriate alteration of present tax consequences could, as a general rule, increase the likelihood of divestiture relief." *Hearings before the Senate Committee on Finance on S. 200* (86th Cong., 1st Sess., May 26, 27, 1959, p. 7). At the hearings on a similar proposal in the House, the Acting Assistant Attorney General in charge of the Antitrust Division supplied for the record a list of "benchmark antitrust divestiture cases [that] * * * might well not have been decreed had today's tax rates prevailed." *Hearings before House Committee on Ways and Means on H.R. 8126* (86th Cong., 1st Sess., July 20, 21, 1959, p. 18).[73]

[73] The decisions listed were United States v. Northern Securities Co., 193 U.S. 197; United States v. Standard Oil Co., 221 U.S. 71; United States v. American Tobacco Co., 221 U.S. 106; United States v. E. I. du Pont de Nemours & Co., 188 Fed. 127; United States v. Union Pacific Ry. Co., 188 Fed. 102; United States v. International Harvester Co., 1 D. & J. 332; United States v. Eastman Kodak Co., 230 Fed. 532; United States v. Swift & Co., CCH Trade Reg. Rep., Ct. Dec. Supp. VI, par. 6267; United States v. American Telephone & Telegraph Co., 1 D. & J. 483; United States v. American Thread Co., 1 D. & J. 449; United States v. National Food Products Corp. (consent decree) (Eq. 35-61, S.D.N.Y.). The Assistant Attorney General also supplied a list of recent cases in which prayers for divestiture were denied that "may well be explicable, in part at least, by the tax consequences of relief sought." Hearings, p. 18. The list included United States v. National Lead Co., 332 U.S. 319; United States v. Timken Roller Bearing Co., 341 U.S. 593; United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950). The witness, in addition, informed the Senate Committee that "we have several pending cases, besides this, the resolution of which might be aided by removal of tax barriers to divestiture." Hearings, p. 334.

In a written statement of the position of the Department of Justice filed with the Senate Committee, the tax consequences in a case such as the present were recognized as particularly important. The statement pointed out that where the antitrust proceeding involves a long-since consummated acquisition (Hearings, p. 318)—

> "there may well be a substantial appreciation in value of stock acquired between the time of acquisition and the time of divestiture. And it is in such instances where tax relief may be most appropriate."

See also Hearings, pp. 315, 331.

The Committees in both the Senate and the House recognized the importance of the tax consequences of divestiture in antitrust cases and recommended legislation that would have substantially ameliorated those consequences. See S. Rep. No. 1767, 86th Cong., 2nd Sess., p. 22; H. R. Rep. No. 1128, 86th Cong., 2d Sess., pp. 6-7. The proposed legislation was not reached for a floor vote in either house,[74] but a similar bill has already been introduced in the present Congress. H. R. 1123, 87th Cong., 1st Sess.

It is apparent that the impact of taxes *is* a pertinent factor to be considered by a district court in fashioning a decree which gives appropriate recognition to the "exigencies of the particular case." This Court has consistently held that although courts, in the formulation of antitrust decrees, should be alert to give effective relief, they also should take into account the probable effect of proposed remedies on private interests, particularly when those effects may touch the interest of a large number of persons who have had no relation-

[74] See 106 Cong. Rec. No. 148, p. 17453, Sept. 1, 1960 (daily ed.).

ship to the violation. *United States* v. *American Tobacco Co.*, 221 U.S. 106, 185;[75] *United States* v. *United Shoe Machinery Co.*, 247 U.S. 32, 45-47; see also *United States* v. *United States Steel Corp.*, 251 U.S. 417, 452-453. There is no merit in appellant's assertion that there is something peculiar about taxes which makes it inappropriate to consider tax consequences along with all the other economic results that might follow from the application of a particular remedy. Here, as a result of the 40-odd years of growth and development that have intervened since the acquisition of the General Motors stock by du Pont, the divestiture of title that appellant demands would injure innocent persons and would in effect deprive them of a substantial part of their investment.[76] This is peculiarly a situation in which the Court, rather than accepting the judicial blinders tendered by appellant, should follow the policy declared in *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 603:

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[75] In commenting on the American Tobacco case to the House Committee, the Acting Assistant Attorney General in charge of the Antitrust Division wrote (Hearings, pp. 25-26):

> "It is important to note that the court's decree was entered in November 1911, prior to the enactment of Federal income tax legislation, and many years prior to the advent of the capital gains tax. It is evident that were present income tax rates applicable at the time, the prospects today for persuading a court to order such [a] comprehensive plan would be remote."

[76] The following colloquy occurred in the recent Senate hearings (p. 326):

> "Senator Frear. • • • would it be reasonable that somebody who bought his stock in 1920 would say that the Federal court in 1957 is going to declare this holding by the Du Pont Co. illegal?
>
> "Mr. Bicks. I don't think so."

> "Since divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available."

The court below was thus not only correct in recognizing as pertinent the tax consequences that divestiture of the legal title would have involved in the present case, but indeed would have been derelict in its duty if it had not considered them in formulating an effective alternative method of complying with the mandate of this Court. As the District Court stated in *United States* v. *Minnesota Mining & Mfg. Co.*, 96 F. Supp. 356, 358 (D. Mass. 1951), in rejecting an argument similar to the one now made by appellant:

> "No one would argue that to run a company into a tax liability not thought necessary under the revenue laws serves an anti-trust purpose."

Finally, appellant's own argument here points toward a rejection of its position as to the irrelevance of the tax consequences that would accompany divestiture of legal title. Appellant concedes that the disruptions of the market for du Pont and General Motors stock "are a proper consideration for a court in framing a decree * * *" (Br. p. 62). Yet as we have pointed out above and as appellant recognizes, the market disruptions that the court found to be inherent in appellant's proposal below are to a significant degree a consequence of the same tax burden that appellant now asserts to be irrelevant (see pp. 64-67, 69-70, *supra*). In *this* case, at any rate, the tax consequences are so extreme, and so intrinsic to the evaluation of any proposal requiring du Pont to divest itself of legal title to the stock, that the court could not ignore them.

The cases cited by appellant (Br. pp. 55-56) are not to the contrary. In *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, this Court agreed with the trial court that to grant effective relief against the conspiracy that had been found to exist it was necessary to divest the interests of the corporate conspirators *inter sese*. And, apart from the obvious differences in the magnitude of the taxes involved,[77] there is the further distinction that, unlike the situation in *Crescent*, the hardships here would not fall on those who have violated the law. The comment by the Court in the *Crescent* case was (323 U.S. at p. 189):

> "Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience."

That comment is plainly inapplicable here.

Nor is appellant aided by the decision in *International Boxing Club* v. *United States*, 358 U.S. 242. Even more strongly than in the *Crescent* case the Court emphasized that the proposals by the defendants which it rejected would have been ineffective to remedy the violation which had been adjudged (*id.*; p. 259). The plea of hardship in that case was not made on the basis of tax consequences but rather rested on an alleged market impact. Moreover the alleged hardship fell on the two men who had themselves promoted the conspiracy and forged the monopoly. Furthermore, the record in the *International Boxing Club* case shows

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[77] The defendants in the Crescent case offered no evidence as to the amount of taxes that they would incur through the disposition of the stock, so that no precise comparison with the present case is possible.

that on the facts there was no support for the plea of hardship.[78]

The question in *Crescent* and *International Boxing Club* was whether the trial court should have entered an ineffective judgment simply because an effective one would cause hardship to the defendants. This Court answered that question in the negative. Here the question is an altogether different one—whether the trial court *must* enter a judgment which will cause injury to approximately one million innocent third parties although it has found, after a careful consideration of all the relevant facts, that a fully effective judgment can be devised which does not involve these severe collateral consequences.

In jettisoning the plan of divestiture of legal title to which it so steadfastly adhered before the District Court and in espousing in this Court what purports to be a new plan, appellant has moved from one untenable position to another. Distribution and sale were the means of divestiture that appellant urged the District Court to order. They remain the means by which the great bulk of the divestment would have to be accomplished under the proposal appellant now urges upon this Court. Heavy income taxes upon individuals and serious depression of market values of General Motors

[78] The contention of defendants in International Boxing that divestiture of their stock might depress the value of stock held by innocent stockholders, to which appellant refers (Br. p. 56), must be judged in the light of the formal offer made at the trial by a Government witness to purchase the entire amount later ordered divested at a price above that at which it was then quoted on the New York Stock Exchange (Record, No. 18, October Term, 1958, p. 824) and in light of the fact that the stock later was sold as a single block at a price also above its then market. N.Y. Times, Feb. 19, 1959, p. 43, col. 2, p. 50, col. 3.

and du Pont stock were the consequences that persuaded the District Court to reject divestiture of legal title. The same consequences inhere in the divestiture proposal now urged upon this Court.

Divestiture of the bare legal title that remains in du Pont under the judgment below would be a harsh and an unnecessary measure. Its consequences cannot be ignored, and they cannot be camouflaged. The evidence of record establishes that such a divestiture order would injure a multitude of persons who cannot on any theory be considered to have committed any wrong. Appellant's tender of flexibility as between the number of shares to be distributed and the number to be sold does not meet the fundamental objection that neither method, and no combination of them, can avoid the serious harm that divestiture of the legal title would inflict.

III

THE CLAYTON ACT DOES NOT MAKE DIVESTITURE OF THE LEGAL TITLE A MANDATORY REMEDY IN SECTION 7 CASES

Appellant argues that the District Court was required to order complete divestiture of du Pont's legal title to the General Motors stock as a matter of law, irrespective of the existence of alternative forms of relief effective to eliminate the effects of the stock acquisition offensive to Section 7 and even if that kind of divestiture would inflict serious harm on the stockholders of du Pont and General Motors. Appellant rests this argument on the ground that the Clayton Act deprives the federal courts of discretion and makes complete divestiture mandatory in all Section 7 cases. The District Court considered

this argument at length and rejected it. See R. 3199-3203. In this Court appellant has changed the form of its argument without changing its substance.

Appellant now concedes that Section 15 of the Clayton Act, from which the District Court derives its equitable jurisdiction, does not by its terms make mandatory a divestiture of the legal title, but argues that it is reasonable "to imply" that Section 11 of the Clayton Act, which deals with the enforcement procedures of the Federal Trade Commission and other regulatory agencies, limits and reduces the equitable jurisdiction of the courts and makes divestiture of the legal title imperative as a matter of law (Br. pp. 23, 30). This argument asserts the existence of a Congressional command that is more than permissive and hortatory, and that lays down a general rule of law for judicial conduct that applies with equal force to all cases under Section 7 without regard to the facts or the particular exigencies of the case with which the court is confronted. Hence the ultimate issue that it poses does not dffer from the issue raised by appellant in the court below.

Appellant's concession noted above—that the statute which confers equitable jurisdiction upon the courts to enforce Section 7 does not explicitly restrict or reduce the historic equity powers of the courts or prescribe any particular remedy as mandatory (Br. p. 30)—requires appellant to argue in the teeth of the principle stated by this Court in *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398:

> "Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a

necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown* v. *Swann,* 10 Pet. 497, 503."

Appellant's contention finds no support or justification in the words of the pertinent statutory provisions, their legislative history, the relevant decisions or any valid considerations of policy.

A. THE JURISDICTION OF THE DISTRICT COURT, INCLUDING ITS POWER TO FRAME A FINAL JUDGMENT, IS DERIVED FROM SECTION 15 OF THE CLAYTON ACT, WHICH DOES NOT MAKE DIVESTITURE A MANDATORY REMEDY

The power of a district court to grant equitable relief to the Government in cases brought under Section 7 of the Clayton Act derives from Section 15 of that Act. Section 11 of the Act, on which appellant principally relies, is confined by its terms to the procedure to be followed by certain administrative agencies.

In pertinent part, Section 15 is identical with the cognate provisions of the other principal antitrust acts under which the district courts also exercise equity jurisdiction, *viz.,* the Sherman Act (26 Stat. 209, U.S.C. Title 15, Sec. 4), and the Wilson Tariff Act (28 Stat. 570, U.S.C. Title 15, Sec. 9):

> "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act * * *"

Nothing in these words provides any support for the suggestion that the equity powers conferred upon the courts by Section 15 are subject to peculiar limitations, or are in any way to be distinguished from the

equitable powers granted to the courts under the other antitrust laws. And appellant itself admits that Section 15 "is not explicit" in prescribing that any particular kind of relief shall be mandatory (Br. p. 30).

The legislative history of Section 15 shows that the pertinent language was intentionally taken, as appellant concedes (Br. p. 36), *in haec verba* from Section 4 of the Sherman Act and that the language of Section 15 was intended by Congress to give the courts the same range of equitable jurisdiction that the courts exercise under the Sherman Act. The House Committee report on the bill, for example, stated (H.R. Rep. No. 627, 63d Cong., 2d Sess., p. 21 (1914)):

> "Section 13 [which became Section 15] is a reenactment of section 4 of the act of July 2, 1890, so as to enable the United States to proceed against corporations for the violation of any of the provisions of this act as it is now authorized by law to proceed against corporations for violations of the Sherman Act."

To the same effect are S. Rep. No. 698, 63d Cong., 2d Sess., pp. 17, 50; 51 Cong. Rec. 14514, 15944, 16321 and 51 Cong. Rec. App. 1181.[79]

Confronted with this legislative history and conceding, as it must, that the words of Sections 4 and 15 are identical, appellant has resorted to the extraordinary assertion that the very identity of the two sections dem-

[79] The balance of the legislative history of the Clayton Act referred to by appellant (Br. pp. 37-39) is concerned only with the fact that criminal penalties were at one time proposed and then abandoned and with the fact that various administrative agencies were, in addition to the district courts, given enforcement powers. These matters are not in issue here and they provide no support for appellant's argument.

onstrates that they must be construed differently (Br. p. 36):

> "Since Congress intentionally patterned Section 15 of the Clayton Act on Section 4 of the Sherman Act * * * it follows that Congress must have intended that the type of relief customary under the Sherman Act for violations arising from acquisitions should be used also under the Clayton Act."

If this passage is, as it appears to be, an argument that the identity of the language of Sections 4 and 15 compels the conclusion that what is discretionary, even if "customary", under the former section is mandatory under the latter, the short answer is that the argument flies in the face of accepted standards of statutory construction and finds no support in legislative history or in the decisions. Neither Section 15 nor the committee reports on the section speak in terms of "customary" relief; on the contrary, Congress explicitly gave the courts the same range of equitable powers and discretion that the courts possess under Section 4 of the Sherman Act. There is nothing in the language of the statute or in its legislative history that could reasonably be said to give rise to the "necessary and inescapable inference" required to demonstrate that Congress intended to restrict and limit the historic equity powers of the federal courts. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398.

Because there is no basis on which the identical words of Sections 4 and 15 can be read in one section as imposing an implied mandatory limitation that is not found in the other, it follows that divestiture cannot be the mandatory remedy under Section 15 unless it is also a mandatory remedy under Section 4. Yet appellant itself appears to recognize that both before

and after the passage of the Clayton Act the courts have held that under Section 4 they have general discretion in the framing of decrees and that there is no mandatory requirement of divestiture or dissolution in every case of unlawful acquisition or combination if there is another effective remedy available.

In *United States* v. *Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383, decided in 1912, two years before the passage of the Clayton Act, a combination of terminal facilities resulting from the Terminal Association's acquisition of competing bridge and ferry companies was held unlawful, but divestiture or dissolution was not ordered. The Court stated (*id.*, p. 409):

> "The Government has urged a dissolution of the combination between the Terminal Company, the Merchants' Bridge Terminal Company and the Wiggins Ferry Company. That remedy may be necessary *unless one equally adequate can be applied.*" (Italics added.)

And in the spring of 1914, in another major litigation, the District Court had refused to dissolve an unlawful combination of towing companies. *United States* v. *Great Lakes Towing Co.*, 208 Fed. 733, 746-747 (N.D. Ohio 1913), 217 Fed. 656 (N.D. Ohio 1914), *appeal dismissed*, 245 U.S. 675. The court said (217 Fed. at p. 658):

> "Section 4, which alone relates to the equitable remedy, invests the appropriate courts with 'jurisdiction to prevent and restrain violations of this act.' * * * While the power to dissolve an unlawful combination clearly exists, and should be exercised when necessary to give complete relief, the legislative policy, as disclosed by the terms of the act, is clearly to resort to restraint rather than

to dissolution, except where restraint alone is inadequate."

These decisions under Section 4 which preceded the enactment of the Clayton Act were obviously known to Congress when it framed the provisions of Section 15. They show that when Congress expressly provided that courts should have the same range of equitable powers in enforcing Section 7 that they possessed in enforcing the Sherman Act, Congress was aware that the courts had held that divestiture was not a mandatory remedy under the latter statute. In these circumstances there can be no rational basis for the suggestion that even though Congress was aware of the judicial interpretation of Section 4, and even though it used language identical to Section 4 in Section 15, nonetheless it intended that the language of Section 15 should be read as containing an unexpressed but implied limitation on equity jurisdiction.

There has been no change in the interpretation of Section 4 since the passage of the Clayton Act. The cases cited by appellant establish that the courts have authority to order divestiture; that in some situations divestiture may be an appropriate remedy; and that in other situations it may be the only effective remedy. These propositions are not in dispute. But it has never been held that divestiture is mandatory under Section 4, and that a court is compelled to order divestiture if another effective and appropriate remedy is available. Indeed, in a substantial number of Sherman Act cases the courts have refused to order divestiture and have done so in terms that leave no doubt that they have construed Section 4 as confirming the power of a court of equity to choose its remedies with an eye to the exigencies of particular situations. See, for example,

Timken Roller Bearing Co. v. *United States,* 341 U.S. 593; *United States* v. *Imperial Chemical Industries, Ltd.,* 105 F. Supp. 215 (S.D.N.Y. 1952); *United States* v. *Minnesota Mining & Mfg. Co.,* 96 F. Supp. 356 (D. Mass. 1951); *United States* v. *Aluminum Co. of America,* 148 F.2d 416 (2d Cir. 1945), 91 F. Supp. 333 (S.D.N.Y. 1950); *United States* v. *American Can Co.,* 234 Fed. 1019 (D. Md. 1916), *appeal dismissed,* 256 U.S. 706.

Thus this Court in the *Timken* case said (341 U.S. at pp. 602-603):

> "There are no specific statutory provisions authorizing courts to employ the harsh remedy of divestiture in civil proceedings to restrain violations of the Sherman Act * * * and divestiture of property has been used in decrees, not as punishment, but to assure effective enforcement of the laws against restraint of trade. [Citations omitted.]
>
> "Since divestiture is a remedy to restore competition and not to punish those who restrain trade, it is not to be used indiscriminately, without regard to the type of violation or whether other effective methods, less harsh, are available. That judicial restraint should follow such lines is exemplified by our recent rulings in *United States* v. *National Lead Co.,* 332 U.S. 319 * * *."[80]

And in the *Minnesota Mining* case the District Court stated (96 F. Supp. at p. 358):

> "The difficulty that I find in this argument [that divestiture was required as a matter of law] is

[80] The three members of the Court who would have affirmed the District Court's order of divestiture also recognized that there was no mandatory requirement that that relief be ordered, and merely took the position that the District Court had not been shown to have abused its discretion. See 341 U.S. at pp. 600-601.

that there is no specific requirement of any anti-trust statute, or, indeed, of any case familiar to the Court, that dissolution and divestiture must always occur."

Appellant also argues (Br. pp. 29-30) that because Section 7 of the Clayton Act is "narrowly directed", in the sense that it deals with a specific kind of restraint, it follows that the Act implicitly requires that legal title to stock unlawfully acquired should be divested. This argument overlooks the fact that an acquisition of stock is subject to the test of the Sherman Act as well as that of Section 7 of the Clayton Act. There is no difference in the kind or quality of illegality under the two statutes that would justify the conclusion that in framing relief with respect to an unlawful acquisition, a court should have greater discretion under the Sherman Act than under the Clayton Act. On the contrary, to the extent that there are differences between the standards of legality under the two statutes, those differences suggest the converse of appellant's argument. The Sherman Act deals largely with existing restraints, whereas Section 7 was enacted primarily to deal with restraints that are incipient and probable. It would be irrational to infer that although Congress gave the courts wide discretion in dealing with accomplished and existing public harm, it intended to give the courts less discretion where the injury to the public interest was no more than potential.[81]

[81] Acceptance of appellant's argument would mean that if in this case this Court, without reaching the Section 7 question, had held that du Pont and General Motors constituted a combination in actual restraint of trade in violation of the Sherman Act the District Court would have enjoyed discretion to fashion a remedy other than divestiture, but that since the holding was that du Pont's acquisition of General Motors stock created only a probability of such a restraint the District Court is required to direct divestiture.

Appellant argues that its construction of Section 15 does not deprive the district courts "of the discretion ordinarily vested in them respecting determination of appropriate and necessary relief" because they are still left with the power to determine the means and methods for effecting divestiture (Br. p. 36). But in truth appellant's construction of Section 15 strikes at the very substance of the historic powers of an equity court. It deprives an equity court of any power to choose among different remedies depending upon the exigencies of the particular case before it—a result which is inconsistent with "the elements of flexibility and expansiveness" which have always marked equity procedure.[82]

Appellant cites no decision holding that divestiture of the legal title to stock unlawfully acquired is a mandatory remedy under either the Sherman or Clayton Act. As we have shown, it is well established that such divestiture is not mandatory under the Sherman Act. In its remand of the case to the District Court this Court directed elimination only of the "effects" of the acquisition, and did not suggest that complete divestiture of the legal title is a mandatory remedy in Section 7 cases. On the contrary this Court stated that "the District Courts, in the framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case'." 353 U.S. at pp. 607-608.

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[82] See United Steelworkers of America v. United States, 361 U.S. 39, 71 (dissenting opinion):

> "One historic feature of equity is the molding of decrees to fit the requirements of particular cases. * * * Equity decrees are not like the packaged goods this machine age produces. They are uniform only in that they seek to do equity in a given case."

The courts have recognized that divestiture is not a mandatory remedy in Section 7 cases, and that other remedial measures may be appropriate. In *United States* v. *New England Fish Exchange*, 258 Fed. 732 (D. Mass. 1919), 292 Fed. 511 (D. Mass. 1923), the court held that the acquisition by Bay State Fishing Company of eight concerns, including John R. Neal Company, violated Section 7. The court, while ordering the divestiture of the stock of such acquired concerns, permitted Bay State Company first to liquidate John R. Neal Company and merge its assets with those of its own.[88]

In *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*,

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[88] Appellant attempts to diminish the effect of that holding by asserting (Br. p. 39) that the complaint also charged violations of the Sherman Act and "only incidentally violation of Section 7 of the Clayton Act." The divestiture denied in that case was of a company specifically charged and found—whether "incidentally" or not—to have been acquired in violation of Section 7. If the appellant is correct in its view as to the mandatory nature of the remedy in a Section 7 case, the District Court in the Fish Exchange case obviously would not have been relieved of its obligation to order divestiture merely because other violations of law were also charged. In short, the case illustrates the point that appellant seeks to deny: that if an unlawful acquisition can be effectively dealt with by other remedial means, divestiture is not required simply by virtue of the fact that the acquisition and holding have been found to have been unlawful. Appellant also attempts (Br. p. 39) to make a point of the fact that in the Fish Exchange case the trial court's decree enjoined the continued holding of the stock of any of the eight concerns, including that of John R. Neal Company. In view of the fact that the decree expressly permitted Bay State Fishing Company to acquire the assets of John R. Neal Company, it is difficult to see the significance, in the present context, of the empty formalism of such a provision. Certainly this was not divestiture as now sought by appellant. Any real divestiture obviously would not have permitted the acquisition of the assets. *Cf.* Federal Trade Commission v. Western Meat Co., 272 U.S. 554.

259 F.2d 524 (2d Cir. 1958), complete divestiture of the stock unlawfully acquired was sought and was denied. Instead the court enjoined the voting of any of the stock. The court said (152 F. Supp. at pp. 400-401):

> "So much of the complaint as seeks a decree directing the defendant to divest itself of stock of the plaintiff company which it may now own is not granted in view of the fact that issuance of the injunction as hereinbefore directed constitutes an appropriate remedy so that divestiture is not necessary."

Appellant attempts to distinguish this case (Br. p. 40) by arguing that the relief appropriate to safeguard a private person against injury under Section 16 is not a measure of the relief requisite in a suit by the United States. Since the United States has not brought a proceeding of its own to secure further relief against the violation already adjudged in the *Sugar* case, appellant's attempted distinction appears to be dictated by the exigencies of argument. Certainly it is not supported by anything in the language of the statute or by any considerations of logic or authority. When stock is acquired in violation of Section 7, the injury to the public interest is the same whether the fact of illegality is adjudicated in a suit brought by the Government or in one brought by a private plaintiff, and the injunctive relief obtained in a private suit vindicates and protects the public interest as well as the private interests of the plaintiff. Since appellant's arguments that divestiture is the mandatory remedy under Section 15 proceed from the premise that Congress has determined that nothing less than divestiture will serve to protect the public interest, those argu-

ments provide no substantial basis for asserting that the scope of a district court's discretion is greater in a private suit than it is in a suit brought by the United States. Certainly nothing in the words of Sections 15 and 16 suggests that the range of discretion conferred upon the courts is less under one section than it is under the other.

In addition to these two cases, judgments have been entered in a number of cases brought under Section 15 that have been disposed of by consent that necessarily recognized that divestiture of property acquired in violation of Section 7 is not relief required as a matter of law. In *United States* v. *Maremont Automotive Products, Inc.*, CCH Trade Cases, ¶ 69,881 (N.D. Ill. 1960), the judgment permitted retention of the acquired stock and ordered divestiture of only part of the underlying assets of the acquired company. In *United States* v. *Schenley Industries, Inc.*, CCH Trade Cases, ¶ 68,664 (D. Del. 1957), and *United States* v. *General Shoe Corp.*, CCH Trade Cases, ¶ 68,271 (M.D. Tenn. 1956), the acquired properties were not divested. In *United States* v. *Hilton Hotels Corp.*, CCH Trade Cases, ¶ 68,253 (N.D. Ill. 1956), the hotels alleged to have been unlawfully acquired were permitted to be retained; divestiture was ordered only of hotels already owned at the time of the challenged acquisitions and the legality of the acquisition of which was not in question. In *United States* v. *Minute Maid Corp.*, CCH Trade Cases, ¶ 68,131 (S.D. Fla. 1955), divestiture of only part of the property alleged to have been unlawfully acquired was required.

Appellant cannot dismiss these precedents as not relevant to the issue whether divestiture relief is man-

datory on the ground that they were consent judgments and that there had been no adjudication of violation.[84] In an equity suit brought to restrain violations of a statute expressing a general Congressional policy, "the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." *System Federation* v. *Wright*, 29 U.S.L. Week 4099, 4102, Op. dated Jan. 16, 1961. Hence a decree entered by consent is no less a judicial act than one entered after litigation. *Ibid;* see also *United States* v. *Swift & Co.*, 286 U.S. 106, 115; *Ford Motor Co.* v. *United States*, 335 U.S. 303, 322-323 (dissenting opinion).

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[84] These cases are also persuasive evidence of the past official views of the Department of Justice on the question whether divestiture is mandatory in Section 7 cases brought under Section 15. Indeed, the decree in the Maremont case, entered in December 1960, during the pendency of the present appeal, suggests that the Department's views in this regard have not changed in practical application, despite the contrary views concurrently being urged in the instant case.

As a practical matter, in consent decree negotiations with the Department of Justice, the defendants are required to proceed on the basis that the alleged violation exists and that negotiation is limited to matters of remedy. If, as appellant contends, total divestiture of stock is an absolute and mandatory requirement in Section 7 cases, it cannot be assumed that the Government would sanction retention of the stock or assets illegally acquired any more than it would sanction by consent the perpetuation of a price-fixing arrangement that was illegal *per se*. If, on the other hand, the Government had become persuaded that the complaints were without foundation and that the acquisitions were not unlawful, dismissal of the actions would have been the proper, and not an unprecented, course. It must be assumed that the legal criterion under which the Government acted in entering into the settlements was whether the particular remedies adopted were adequate to eliminate the unlawful consequences of the challenged acquisitions and to protect the public interest.

In summary, it appears from the words of Section 15 and from its legislative history that the range of equitable discretion conferred upon the courts by that section is co-extensive with the discretion granted to the courts by Section 4 of the Sherman Act. A long line of decisions establishes that in devising remedies under Section 4 the historic equity powers of the federal courts are not confined or limited by any rule that divestiture of stock or assets unlawfully acquired is a mandatory remedy but that the courts are free to mold each decree to the necessities and exigencies of the particular case. No court has ever held that divestiture is a mandatory remedy under Section 15 of the Clayton Act, and such authority as exists points to the contrary conclusion. It is against this background that we shall now consider appellant's contention that the equitable powers of the federal courts under Section 15 of the Clayton Act have by implication been reduced and restricted by the provisions of Section 11.

B. SECTION 11 OF THE CLAYTON ACT DOES NOT, EITHER EXPRESSLY OR BY IMPLICATION, LIMIT THE DISCRETION CONFERRED ON THE DISTRICT COURTS BY SECTON 15.

Appellant contends (Br. pp. 30-31) that a single clause of a single sentence in Section 11 of the Clayton Act overrides and limits the language of Section 15, and deprives the courts in Clayton Act cases of the flexible and adaptable discretion that they possess to frame decrees in cases arising under the Sherman Act.[85]

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[85] The full text of Section 11 is set out in the Appendix. The sentence containing the clause to which appellant refers states:

"If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the

The sentence on which appellant relies does not even mention the district courts or the equitable powers they exercise under Section 15; it is directed solely to the procedure to be followed by administrative agencies in enforcing Section 7.[86] Appellant's argument implicitly recognizes that it can derive no comfort from the words of Section 11 as such. Appellant therefore takes the position that the "underlying policy" of Section 11 serves as a "guiding light" and gives rise to a necessary implication or inference that the section limits and reduces the historic equitable powers that would otherwise be conferred upon the federal courts by Section 15 (Br. pp. 30-31).

Appellant's argument involves two propositions: (1) that Section 11 leaves an administrative agency with no discretion except to order divestiture of the legal title in any case in which it finds that stock or assets have been acquired in violation of Section 7, and (2) that since this is true of administrative agencies, it must necessarily also be true that the equity powers of the federal courts have been similarly restricted.

We submit that both propositions are wrong. We believe, however, that it is not necessary for the Court

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facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock • • • held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order."

[86] The sentence does not even deal with the power of the courts to review orders of the administrative agencies. That matter is dealt with in a subsequent sentence in Section 11 under which the courts of appeals are granted reviewing powers in the broadest terms, viz., power to enter a decree "affirming, modifying, or setting aside the order."

in this case to adjudicate the nature and the scope of the enforcement powers granted by Section 11 to the Federal Trade Commission and other regulatory agencies. Whatever the situation may be as to those agencies Section 11 does not limit the equitable jurisdiction of the federal courts.

As we have already noted (pp. 105-106, *supra*) this Court has consistently held that "the comprehensiveness" of the historic equitable powers of federal courts is not to be denied, limited or reduced except by a clear and explicit legislative command. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398; *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330. See also *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 471-472; *United States* v. *W. T. Grant Co.*, 345 U.S. 629.[87]

Appellant does not and cannot meet this standard. It can point to no statutory language that explicitly "or by a necessary and inescapable inference" restricts the equitable jurisdiction of the federal courts. *Porter* v. *Warner Holding Co., supra.* Instead appellant is

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[87] In the Grant case, suit was brought by the United States under Section 15 of the Clayton Act to enjoin interlocking corporate directorates which violated Section 8 of the Clayton Act. This Court held that the lower court did not abuse its equitable discretion by dismissing the suit and by refusing injunctive relief on the ground that the directorates had been terminated and there was no reasonable probability that they would be resumed. Under appellant's interpretation of Section 11, if this proceeding had been initiated before the Federal Trade Commission and it had found the directorates to be in violation of Section 8 the Commission would have been under a mandatory duty to issue a cease and desist order. In the *Grant* case the Government did not argue that Section 11 controlled the exercise of the equity powers of the District Court and no suggestion of that kind appears in either the majority or dissenting opinion.

forced to rely upon a general appeal to "the underlying policy" and "guiding light" of Section 11—a statutory provision that does not deal with or even refer to the equitable powers of the federal courts but which is directed to the procedure to be followed by administrative agencies. Moreover, the internal weakness of the inference which appellant seeks to have drawn from Section 11 is not the sole reason for its rejection. As we have pointed out above, the inference is inconsistent with the words of Section 15, with its legislative history, and with the decisions that have construed and applied the identical language found in Section 4 of the Sherman Act. Taking all these considerations into account the words of this Court in *Hecht Co.* v. *Bowles*, 321 U.S. 321, 330, are particularly pertinent: "* * * if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain."

The arguments now pressed by appellant are strikingly similar to those that the Government advanced and that were rejected by this Court in *Hecht Co.* v. *Bowles*. There the Government contended that a section of the Price Control Act stating that "a permanent or temporary injunction, restraining order, or other order shall be granted without bond" made mandatory upon the district courts the issuance of an injunction when violations of the Act were proved. The Government adduced several statutes dealing with administrative proceedings (including Section 11 of the Clayton Act, see 321 U.S. at p. 329, n. 9) as supporting its construction. This Court said (321 U.S. at pp. 329-330):

> "We do not stop to compare the provisions of § 205(a) with the requirements of other federal

> statutes governing administrative agencies which, it is said, make it mandatory that those agencies take action when certain facts are shown to exist. [Citations omitted] We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' *Meredith* v. *Winter Haven*, 320 U.S. 228, 235. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. We do not think the history or language of § 205(a) compel it."

Appellant asserts that "it seems unreasonable to assume that Congress intended that the type of relief which it prescribed when the Commission is the enforcing agency was not equally deemed by Congress to be the appropriate and necessary kind of relief when the United States is the enforcing agency" (Br. p. 34). Even if Section 11 were to be construed as appellant urges (but see pp. 124-133, *infra*), there is no basis for appellant's assertion that it would be "unreasonable" for Congress to impose limitations on the power of

an administrative agency that it would not wish to make applicable to the district courts.[88]

In the federal system district courts occupy a position and discharge functions different in kind from the position and functions of the regulatory agencies. This Court has recognized that federal courts, by reason of their origin and history, possess power and discretion in the exercise of their equity jurisdiction that Congress has not given to the administrative agencies. See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329. Thus this Court has held that the Federal Trade Commission in the exercise of its enforcement functions under the antitrust laws does not have the range of discretion in devising remedies that is possessed by the federal courts. See, for example, *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, 291 U.S. 587; *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U.S. 619, 623-624.

The fact that the Clayton Act itself withholds certain powers from the Federal Trade Commission has not been thought to require the Act to be construed to impose similar limitations on the equitable powers of the federal courts. For example, in a proceeding

[88] What would truly be unreasonable would be to assume, as appellant asks this Court to do, that Congress intended to curtail the equity jurisdiction of the federal courts and did so not by an explicit direction but by implication or innuendo arising from the words of a statutory provision directed solely to the procedure of regulatory agencies. And this irrationality would be compounded when it is remembered that acceptance of appellant's contention would require the conclusion that the operation of this implication or innuendo leaves the federal courts with less discretion to deal with incipient restraints under the Clayton Act than those courts have always possessed and exercised in dealing with consummated restraints and monopolies under the Sherman Act.

initiated before the Commission under Section 11 of the Clayton Act the Commission has no authority to issue a temporary injunction or to devise other kinds of interlocutory relief. And it has been held that in such a case the Commission cannot obtain interlocutory relief from the courts. See *Federal Trade Commission* v. *International Paper Co.*, 241 F.2d 372 (2d Cir. 1956). In contrast, in a proceeding brought by the United States under Section 15 of the Clayton Act the Attorney General upon a proper showing may obtain from the court interim relief in the form of a temporary injunction or a restraining order. See *United States* v. *Brown Shoe Co.*, CCH Trade Cases, ¶ 68,244 (E.D. Mo, 1956).[89]

So far in this discussion we have assumed, *arguendo*, that appellant correctly construes Section 11. That construction would compel a holding that Section 11 requires the administrative agencies to order divestiture—and the courts of appeals to enforce compliance with such orders—in every case of an illegal acquisition. The agencies would not be permitted to take any account of the fact, for example, that removal of the very effects proscribed by Section 7 might already have been accomplished because of a change in circumstances or because removal of such effects may be, or has been, accomplished in some other way, such as by divestiture of voting rights. The argument would require the conclusion that the word "divestiture", as used in Section 11, can mean only complete and total divesti-

[89] If the Attorney General should intervene in a Section 7 case initiated before the Commission under Section 11, as he is entitled to do, he could not obtain from the Commission the interlocutory relief that he might be able to obtain in a proceeding in the District Court brought under Section 15.

ture of all legal right, title and interest of the acquiring company in the acquired stock, and not merely divestiture of those incidents of stock ownership that make possible an actual or potential restraint of competition or tendency to monopoly.[90]

Although we do not believe it necessary for the Court to pass upon those contentions we submit that even the regulatory agencies are not thus limited.

The key portions of Section 11 are (1) the provision that respondent, upon service of a complaint, shall have the right to "show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint", and (2) the provision that the agencies, upon a finding of violation, "shall issue * * * an order requiring such person to cease and desist from such violations, and divest itself of the stock held * * * contrary to the provisions of [Section] seven * * * of this Act."

1. Appellant's emphasis and reliance on the literally mandatory nature of some of the language used in Section 11 is misplaced. "Words like * * * must,

[90] These economic consequences are essential elements of illegality under Section 7. Appellant ignores this fact when it attempts to argue by analogy from Section 8 that in every Section 7 case divestiture is a mandatory remedy (Br. p. 22). Section 8 is violated by the mere existence of interlocking directorates without regard to their competitive effects and without regard to the manner in which the directors perform their duties. Illegality under Section 8 can therefore be resolved only by elimination of the interlocking directorates. In contrast illegality under Section 7 can be removed by a judgment that effectively eliminates the economic effects offensive to the statute. This distinction was recognized in United States v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D.N.Y. 1953).

shall, and so forth, are constantly used in statutes without intending that they shall be taken literally, and in their construction the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed." *Fields* v. *United States,* 27 App. D.C. 433, 440 (1906); see also *Moore* v. *Illinois Central R. Co.,* 312 U.S. 630, 635-636; *West Wisconsin R. Co.* v. *Foley,* 94 U.S. 100, 103. Further, an argument derived from the literal language of only one portion of the section proves too much. For example, Section 11 literally states that if any of the provisions of the Act "*have been* or are being violated", an order "shall issue requiring such person to cease and desist from such violation and divest itself of the stock," but it is well established that when the violation has ceased the Commission may, and indeed under appropriate circumstances must, decline to issue any such order. *Stokely-Van Camp, Inc.* v. *Federal Trade Commission,* 246 F.2d 458 (7th Cir. 1957); *cf. United States* v. *W. T. Grant Co.,* 345 U.S. 629; see also *Deer* v. *Federal Trade Commission,* 152 F.2d 65, 66 (2d Cir. 1945).

2. Appellant's argument would require the Court to ignore the fact that Section 11 speaks of divestiture only of stock held "contrary to the provisions of" Section 7. Even if the language of the section were to be construed as mandatory, it would be by its terms inapplicable to the holding of stock which by other remedial means has been deprived of all of the potentialities which Section 7 proscribes, because such stock would not be held "contrary to the provisions of" Section 7.

3. Appellant's position that total divestiture is mandatory under Section 11 necessarily proceeds on the assumption that the "*and*" in the phrase "shall issue

* * * an order requiring such person to cease and desist from such violations, *and* divest itself of the stock" must be read conjunctively, and not disjunctively, despite the fact that in the earlier provision of Section 11 quoted above respondent must show cause only why an order should not be entered requiring him to "cease and desist from the violation of the law so charged in said complaint."

It is, however, a well-established principle of statutory construction that the word "and" may be read disjunctively and should be so read when necessary to give appropriate effect to the intention of the legislature. 2 Sutherland, *Statutory Construction* (3d ed. 1943), Sec. 4923. This Court has said (*United States* v. *Fisk*, 3 Wall. 445, 447):

> "In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe '*or*' as meaning '*and*', and again '*and*' as meaning '*or*'."

See also, *e.g.*, *Dumont* v. *United States*, 98 U.S. 142, 143; *De Sylva* v. *Ballentine*, 351 U.S. 570, 573.

A similar reading of "and" in Section 11 would be consistent both with the remaining provisions of the section and with the concepts of antitrust remedies familiar at the time of the passage of the Clayton Act. See pp. 109-110, *supra*.

4. No court has held that divestiture is mandatory on the Federal Trade Commission. Although the Commission, as appellant points out (Br. pp. 32-33), has on many occasions ordered divestiture, it is equally true that in other cases it has taken the position that it need not do so.

The decision in *In the Matter of Temple Anthracite Coal Co.*, 13 F.T.C. 249 (1930), *rev'd on other grounds*, 51 F. 2d 656 (3d Cir. 1931) involved the simultaneous acquisition by a holding company of the stock of two competing companies. Although the Commission held that both acquisitions were unlawful, so that on appellant's reasoning divestiture of both should have been mandatory under Section 11, in fact the Commission ordered divestiture of only one or the other of the acquired companies, at the holding company's option. 13 F.T.C. at p. 261. In connection with the matter of relief, the Commission's order was made in the face of a strong dissent by Commissioner McCulloch, to the effect that because the acquisitions had been made simultaneously and both were therefore illegal, Section 11 required that both be divested.[91] The question of the Commission's power was, therefore, expressly at issue and was resolved in a manner contrary to appellant's present position.

The violation of Section 7 in *In the Matter of Arrow-Hart & Hegeman Electric Co.*, 16 F.T.C. 393 (1932), *aff'd*, 65 F.2d 336 (2d Cir. 1933), *rev'd on other grounds*, 291 U.S. 587, also consisted of the simultaneous acquisition by a holding company of the stock of two competing companies. Here again, although the Commission expressly held that both acquisitions were unlawful, the remedy prescribed was divestiture

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[91] Commissioner McCulloch pointed out that whether both acquisitions were unlawful depended on whether they were made simultaneously or seriatim. He said:

> "Of course, if the two acquisitions had been wholly separate in the point of time the first would not have been unlawful and a divestiture of stock by the second acquisition—the unlawful one—could only be required." 13 F.T.C. at p. 265.

of the stock of only one or the other of the acquired companies, at the holding company's option. 16 F.T.C. at pp. 422-423.[32]

Appellant attempts to distinguish *Arrow-Hart* by arguing (Br. p. 33 n.) that the case is consistent with its position because once either acquisition had been divested the other would no longer be illegally held. This suggestion squarely contradicts appellant's basic thesis, which is that if stock has been illegally acquired its complete divestiture is mandatory. If the illegality of one acquisition can be cured by the disposition of another illegal acquisition—as *Temple Anthracite* and *Arrow-Hart* hold—it can only be because that disposition eliminates the proscribed economic consequences of both acquisitions.[33] These cases thus show that complete divestiture is not required in all cases of illegal acquisition brought before the Commission but rather that remedies short of such divestiture are

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[32] The order of the Commission is not correctly described in the opinion of the Court of Appeals for the Second Circuit. See 65 F.2d at p. 337.

[33] Appellant's claim (Br. p. 32) that this Court's language in the Arrow-Hart case in fact supports its position that the Commission must always order divestiture of illegally acquired stock is without merit. Appellant fails to note that by its use of the word "may" this Court described the remedy of divestiture in permissive and not mandatory terms. Thus the Court said that Section 11 "specifies the remedy which the Commission may apply, namely, that it may * * * order the violator to divest itself of the stock held contrary to the terms of the Act". Nor does appellant appear to recognize that the issue in that case, against which the Court's language must be read, was not whether a divestiture of illegally acquired stock is mandatory in Commission cases, but rather whether under Section 7 as it stood prior to amendment in 1950, the Commission had the authority to order divestiture after the acquired corporations had been dissolved and their assets merged.

permissible if they remove the economic consequences that Section 7 prohibits.[94]

Federal Trade Commission v. *Western Meat Co.*, 272 U.S. 554, cited by appellant (Br. pp. 31-32), does not hold that the Commission must always order divestiture. Under Section 7 as it existed when that case was decided the Commission had no power to deal with assets previously acquired as a result of an unlawful stock acquisition. The question presented was whether the Commission could order stock to be divested in such a manner as also to make certain of the divestiture of the underlying assets. The respondent admitted an intention to use control of the acquired stock, as was done in the *Arrow-Hart* case, to secure title to the underlying assets before divesting itself of the stock. Accordingly (272 U.S. at p. 559):

> "The purpose which the lawmakers entertained might be wholly defeated if the stock could be further used for securing the competitor's property. And the same result would follow a transfer to one controlled by or acting for the respondent."

Assets, of course, raise different problems than stock, because it is not possible to divorce the power of control from the legal title, as can be done with stock. It

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[94] In a decision handed down after the filing of appellant's brief in this Court the Commission ordered the divestiture of assets found to have been acquired in violation of Section 7 of the Clayton Act. See *In the Matter of Pillsbury Co.*, CCH Trade Reg. Rep. ¶ 29,277 (FTC Dkt. 6000, December 16, 1960). The Commission held that "the remedy here would be complete divestiture" but at the same time appears to have recognized that there was an area of "lawful discretion in the fashioning of an appropriate remedy" and observed that "the propriety of an exercise of discretion in a similar manner has not been demonstrated in this proceeding".

is, therefore, in the light of respondent's purpose in the *Western Meat* case and the necessity for thwarting that purpose that this Court's language referred to by appellant must be read.

The Commission has entered a number of consent judgments that necessarily recognized that divestiture of property acquired in violation of Section 7 is not required as a matter of law. For example, in *In the Matter of Union Bag & Paper Co.*, 52 F.T.C. 1278 (1956), the acquired properties were not divested. Similarly, in *In the Matter of The Vendo Company*, FTC Dkt. No. 6646 (1957), *In the Matter of International Paper Co.*, 53 F.T.C. 1192 (1957), and *In the Matter of Scovill Mfg. Co.*, 53 F.T.C. 260 (1956), divestiture of only part of the property alleged to have been unlawfully acquired was required.[35]

4. The Interstate Commerce Commission is also authorized by Section 11 to enforce compliance with Section 7. Like the Federal Trade Commission, it has taken the position that total divestiture of stock acquired in violation of Section 7 is not mandatory. See, *e.g.*, *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Co.*, 183 I.C.C. 165 (1932); *New York, Chicago and St. Louis Railroad Co. Control*, ICC Finance Dkt. No. 17883, Report dated April 10, 1958 (295 I.C.C. 703), and Order dated August 26, 1958.

In the former case, the Commission had issued a complaint charging that the B & O had violated Sec-

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[35] Appellant's argument that the order in the Union Bag case is of no significance because it was entered by consent (Br. pp. 33-34) is invalid for the reasons that have been stated at pp. 116-117, *supra*, in the discussion of the consent judgments in cases brought under Section 15.

tion 7 by its acquisition of the stock of the Western Maryland Railroad, a competing carrier. After a hearing, divestiture of the stock was ordered. However, after extension from time to time of the order of divestiture, the Commission required merely that the stock be transferred to a trustee under a trusteeship to be approved by the Commission. The trust agreement, as approved, provided for the retention of the B & O's complete beneficial interest in the stock, and in substance effected merely a divestiture of voting power over the stock.

In the case involving the New York, Chicago and St. Louis Railroad Co. (Nickel Plate), after a Commission order calling for an investigation to determine whether the Delaware, Lackawanna and Western Railroad's ownership of stock of the Nickel Plate violated, among other things, Section 7, the Lackawanna placed the Nickel Plate stock in a voting trust and asked for a dismissal of the proceeding. The voting trust did not affect the Lackawanna's beneficial interest in the Nickel Plate stock and in substance amounted merely to a divestiture of voting rights. The Commission stated (295 I.C.C. at p. 715):

> "The Commission has the power to determine whether there has been a divestiture, and in doing so may properly consider a voting trust and, if necessary, state that it would consider the basic qualifications of a trust which would be equivalent to divestiture.
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> * * * * *
>
> "Voting trust agreements have long been accepted by the Commission as a means of effecting compliance with the law in connection with holdings of stock in one railroad by another and without

which the continued ownership of the stock might be considered unlawful, and contrary to the public interest."

The Commission concluded that:

"The divestiture by the applicant of Nickel Plate stock by the voting trust agreement as thus modified negatives any ability the applicant might have had to lessen competition and renders it unnecessary for us to consider further the question of violation of section 7 of the Clayton Act, and no finding with respect thereto need be made at this time or so long as such divestiture continues."

On August 26, 1958 the Commission dismissed the proceeding.

Thus, neither of the two principal regulatory agencies acting under Section 11 to enforce Section 7 has proceeded in accordance with appellant's view that they are so circumscribed that total divestiture is a mandatory remedy, and no court has held or suggested that the agencies exceeded their powers or violated their statutory duty in so doing.

* * * * *

Appellant does not rely solely upon the argument that in a Section 7 case divestiture of the legal title is a mandatory remedy. It also argues that in any event that kind of divestiture is "the normal remedy" and that any other remedy should be applied only in "exceptional cases" (Br. p. 23).

On any view of the facts this is an "exceptional" case. Du Pont first acquired a substantial interest in General Motors in 1917. Thereafter du Pont's interest in General Motors and the commercial relations between the two companies were open and unconcealed.

Appellant waited for more than 30 years before instituting this suit. This is a far longer period of time than has every elapsed between an acquisition and the institution of suit in any other Section 7 case.[96] In this long intervening period of time there was a wide dispersion of ownership of the stock of both du Pont and General Motors[97] with the result that the intervening property interests of more than a million people are now involved; the value of the General Motors stock has greatly increased; and there have been substantial changes in the rates at which taxes are imposed and in other substantive provisions of the Internal Revenue Code that have a direct bearing upon the remedial problems now before the Court. No comparable situation has ever existed in any other case under Section 7 or indeed in any case arising under the Sherman Act. If this is not the "exceptional" case to which appellant refers in its brief it may legitimately be doubted whether any "exceptional" case could ever arise.

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[96] An examination of all of the cases brought by the United States under Section 7 that are disclosed in any published source reveals that the average length of time elapsing between the acquisition challenged and the filing of a complaint has been less than three years.

[97] The number of stockholders of record of General Motors has increased from some 2,000 in 1918 to more than 700,000 in 1958. In the same period, the stockholders of record of du Pont increased from some 7,000 to more than 194,000. See GM Exh. 15, R. 3117; du Pont Exh. 50, R. 3057; du Pont Annual Report for 1920, p. 14.

CONCLUSION

In accordance with the terms of the mandate, the District Court has decreed "the equitable relief necessary and appropriate in the public interest." It has formulated a judgment that is fully effective to "eliminate the effects of the acquisition offensive to the statute" and that at the same time avoids the drastic consequences to the du Pont and General Motors stockholders inherent in the divestiture proposal urged by appellant. Accordingly, the judgment of the District Court should be affirmed.

Respectfully submitted,

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January, 1961

APPENDIX

Statutes Involved

The pertinent provisions of Section 7 of the Clayton Act, Act of October 15, 1914, as it read at the date of the filing of the complaint (38 Stat. 731; U.S.C. (1946 ed.), Title 15, Sec. 18) are:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
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> "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. * * * "

The pertinent provisions of Section 15 of the Clayton Act (U.S.C., Title 15, Sec. 25) and of Section 4 of the Sherman Act, Act of July 2, 1890 (U.S.C., Title 15, Sec. 4) are identical, and read:

> "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * * "

Section 11 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 21) provides in part:

> "'(a) Authority to enforce compliance with sections 13, 14, 18 and 19 of this title by the persons respectively

subject thereto is vested, in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

"'(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requir-

ing such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 18 and 19 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

"'(c) Any person required by such order of the Commission or Board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith transmitted by

the clerk of the court to the commission or board, and thereupon the commission or board shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission or board until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission or board, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. * * * ,,,